

The L'Ambiance Plaza Mediation: A Case Study in Judicial Settlement of Mass Torts

LUCY V. KATZ*

Table of Contents

I. Introduction	278
II. The Collapse	282
III. Theories of Negotiation and Dispute Resolution	284
IV. The Role of Third Parties	290
V. The Collapse and Early Litigation	292
A. The Mediation - Phase One	295
B. The Plaintiffs' Issues	296
1. Workers' Compensation	296
2. Immunity	297
C. The Defendant's Issues	298
1. Contract Claims	298
2. Tort Reform	299
3. Workers' Compensation	299
4. OSHA	300
D. Lift Frame Builders - An Example	300
VI. Mediation Styles and Emerging Themes	301
VII. A Settlement Proposal	309
VIII. The Mediation - Phase Two	312
A. The Commercial Claims	312
B. The OSHA Fines	318
C. The Final Hearing	321
IX. The Settlement	323
A. Why It Worked	324
B. Manipulating Perceptions	325
C. Expanding Opportunities for Trades	327
X. Implications for Judicial Mediation	329
XI. Evaluation of the Mediation Process	332

* Associate Professor of Business Law, Fairfield University, Fairfield Connecticut. B.A., Smith College; J.D., New York University. Member of the Connecticut Bar.

I. INTRODUCTION

Mass tort litigation is increasingly the preoccupation of judges and others concerned with the operation of judicial systems. A mass tort is a dispute involving multiple victims and usually, but not necessarily, multiple defendants.¹ Such disputes are so large and complex that they raise problems for courts that are uncommon in more traditional litigation between individuals or between private or public entities and individuals. Examples include litigation over asbestos, diethylstilbestrol and other drugs, fires and building collapses, and railroad and airline accidents.² While such cases were not unknown in the past,³ there is an increasing awareness today that large and complex litigation requires different procedures from other disputes. Among the noteworthy aspects of mass tort litigation is the extent to which they have been settled by the parties prior to trial.⁴ These settlements, moreover, are rarely achieved without the intervention of a judge acting as case manager or mediator, or otherwise facilitating fruitful communication between the parties. As a result, judges, as well as litigators, have had to develop managerial and interpersonal skills and create or develop new resources, many of which seem far removed from traditional judicial decision-making.⁵ Negotiation strategy and management of people and organizations are demanded of

1. Epstein, *The Legal and Insurance Dynamics of Mass Tort Litigation*, 13 J. LEGAL STUD. 475, 476 (1984). Some writers prefer the term "complex case, or complex litigation," a more generic reference. See, e.g., Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 338 (1986); McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. CHI. L. REV. 440 (1986). The term "mass tort" is a narrower referent to complex personal injury litigation. See, e.g., *Jenkins v. Raymark Indus.*, 782 F.2d 468 (5th Cir. 1986).

2. See, e.g., *In re Bendectin Litigation*, 857 F.2d 290 (6th Cir. 1988), *cert. denied*, *Hoffman v. Merrill Dow Pharmaceuticals, Inc.*, 109 S. Ct. 788 (1989) (bendectin); *Jenkins v. Raymark Indus.*, *supra* note 1; and *Rocco v. Johns-Manville Corp.*, 754 F.2d 110 (3d Cir. 1985) (asbestos); *Gardiner v. A.H. Robins Co. Inc.*, 747 F.2d 1180 (8th Cir. 1984) (Dalkon Shield); *Vincent v. Hughes Air West, Inc.*, 557 F.2d 759 (9th Cir. 1977); and *In re Air Crash Disaster at Florida Everglades* on Dec. 29, 1972, 549 F.2d 1006 (5th Cir. 1977). *Abel v. Eli Lilly and Co.*, 418 Mich. 311, 343 N.W.2d 164, *cert. denied*, *E.R. Squibb & Sons v. Abel*, 469 U.S. 833 (1984) (DES);

3. See Epstein, *supra* note 1, at 477 for an account of some earlier mass torts.

4. See *In re "Agent Orange" Product Liability Litigation*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, *Pinkney v. Dow Chemical Co.*, 1085 S. Ct. 695 (1988); *In re Air Crash Disaster at Stapleton International Airport, Denver, Colorado*, on Nov. 15, 1987, 127 F.R.D. 197 (D. Colo. 1988); See also Coyle, *A \$105 Million Dupont Solution*, NAT'L L.J., May 22, 1989, at 3; *Bus Crash Cases Settled in Kentucky*, NAT'L L.J., July 18, 1988, at 3; *Amtrak Reaches Settlement in 15 Crash Suits*, NAT'L L.J., July 15, 1988, at 6; *Desperately Seeking Settlements*, NAT'L L.J., June 20, 1988, at 1.

5. Lynch & Levine, *The Settlement of Federal District Court Cases: A Judicial Perspective*, 67 OR. L. REV. 239 (1988); Gabriel, *Judicial Participation in Settlement: Pattern, Practice, and Ethics*, 4 OHIO ST. J. ON DIS. RES. 81 (1988); D. PROVIN, *SETTLEMENT STRATEGIES FOR FEDERAL DISTRICT JUDGES* (1986).

THE L'AMBIANCE PLAZA MEDIATION

judges, who find themselves alternating between the roles of corporate manager and psychological counselor as they struggle to make the system accommodate the demands of these complex cases.⁶

Mass tort settlements are taking place in an atmosphere of ever-increasing interest in alternative dispute resolution (ADR), a term generally used to describe new techniques for dispute resolution outside the traditional judicial system.⁷ This groundswell of interest has focused new attention on judicial settlement techniques. Going far beyond arbitration, ADR encompasses techniques such as mediation, mock jury trials, expert fact-finding, and the minitrial, all as a means of counteracting the perceived negatives of litigation. These negatives are said to include high cost, long delays, and alienation of litigants from the decision-making process.⁸

While interest in ADR has grown, behavioral scientists and others have sought to develop a theoretical basis for the analysis of negotiation and dispute resolution. The result has been the emergence of an analytical framework for determining how and why certain conflicts are resolved through negotiation, or some other consensual method, and how disputes can be managed so as to increase the likelihood of settlement. This Article will apply certain theories derived from the behavioral literature to the successful mediation of a mass tort: the collapse of L'Ambiance Plaza, a building under construction in Bridgeport, Connecticut, killing twenty-eight workers and injuring fourteen others. The incident was the second largest construction accident in United States history and the largest mass disaster ever in Connecticut.⁹ While there have been many studies analyzing judicial settlement techniques,¹⁰ and a

6. See, e.g., Brazil, *Hosting Settlement Conferences: Effectiveness in the Judicial Role*, 3 OHIO ST. J. ON DIS. RES. 1 (1987); Provine, *Managing Negotiated Justice: Settlement Procedures in the Courts*, 12 JUST. SYS. J. 91 (1987); Galanter, " . . . A Settlement Judge, not a Trial Judge," *Judicial Mediation in the United States*, 12 J. L. & SOC'Y 1 (1985); Peckham, *A Judicial Response to the Cost of Litigation: Case Management, Two Stage Discovery Planning and Alternative Dispute Resolution*, 37 RUTGERS L. REV. 253 (1985); Lambros, *The Summary Jury Trial and Other Alternative Methods of Dispute Resolution*, 103 F.R.D. 461 (1984).

7. Alternative dispute resolution has received enormous attention in the legal literature in recent years. For an overall sense of the field, see S. GOLDBERG, E. GREEN, & F. SANDER, *DISPUTE RESOLUTION* (1985); J. HENRY & J. LIEBERMAN, *THE MANAGERS' GUIDE TO RESOLVING LEGAL DISPUTES* (1985); see also *supra* notes 5 and 6.

8. See, e.g., D. PROVIN, *supra* note 5, at 1 nn.1-2; Katz, *Enforcing An ADR Clause - Are Good Intentions All You Have?* 26 AM. BUS. L.J. 575, 580-81 (1988).

9. NATIONAL BUREAU OF STANDARDS, *INVESTIGATION OF L'AMBIANCE PLAZA BUILDING COLLAPSE IN BRIDGEPORT, CONNECTICUT* (1987) [hereinafter NBS INVESTIGATION] at 1; McGraw & Houston, *'78 Tragedy Has Lessons for L'Ambiance Families*, THE HARTFORD COURANT, Jan. 24, 1988, at 1.

10. Such studies generally fall into four categories. Some concentrate on describing and categorizing alternative techniques (Provine, *supra* notes 5 and 6; Lynch & Levine, *supra*

few focusing on mass torts,¹¹ none have studied a particular dispute using the analytical framework derived from the behavioral sciences. This Article seeks to fill that gap.¹²

Litigation, predictably, began almost immediately after the L'Ambiance Plaza collapse. What was not predictable was that within nineteen months, two judges, one state and one federal, acting as a mediation panel, would achieve a "global settlement," in which all claims arising out of the collapse, including those of the forty-four plaintiffs, over fifty contractors, several insurance and workers' compensation carriers, and the United States Occupational Safety and Health Administration, were settled at the same time. The settlement was heralded as a unique and highly successful example of judicial alternative dispute resolution.¹³

By drawing on certain behavioral models, it will be possible to understand what behaviors and what aspects of the dispute itself were critical in bringing about such an early and extensive settlement. The result

note 5; Brazil, *supra* note 6). Others have developed quantitative data to measure such variables as the length of case disposition (Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (And Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983); Trubek, Sarat, Felstiner, Kritzer, & Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L. REV. 73 (1983)). A third category consists of models designed to predict when settlement is economically efficient (R. LEMPERT & J. SANDERS, AN INVITATION TO LAW AND SOCIAL SCIENCE (1986); Cooter, Marks & Mnookin, *Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior*, 11 J. LEGAL STUD. 225 (1982) [hereinafter Cooter]; Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U. CHI. L. REV. 366 (1986); Priest & Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984); Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61 (1971); H. RAIFFA, THE ART AND SCIENCE OF NEGOTIATION (1982); Raiffa, *Mediation of Conflicts*, 27 AM. BEHAV. SCI. 195 (1983). Still others have questioned whether the enthusiasm for ADR in the courts is grounded in reality and/or meets the requirements of justice as defined in American law (Schuck, *supra* note 1; Posner, *supra* note 10; Gabriel, *supra* note 5; Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984)). Most works on alternative dispute resolution include some evaluation of the process, as will this article in the concluding sections.

11. Schuck, *supra* note 1; P. SCHUCK, AGENT ORANGE ON TRIAL (1986); McGovern, *supra* note 1; and Epstein, *supra* note 1.

12. Seminal work in this area has been done by Carrie Menkel-Meadow, who has written extensively on the relationship of the behavioral literature on dispute resolution and legal negotiation. See Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984); Menkel-Meadow, *Legal Negotiation: A Study of Strategies in Search of a Theory*, 1983 AM. B. FOUND. R. J. 905 (1983). Menkel-Meadow does not, however, apply her theoretical work in the case study format.

13. Judge, Lead Counsel Analyze Building Collapse Mediation, 3 BNA ALTERNATIVE DISPUTE RESOLUTION REPORT 92 (March 16, 1989) (summarizing a symposium on the L'Ambiance Plaza Mediation held at Princeton University by the New Jersey Center for Dispute Resolution); *The CPR '88 ADR Awards: Wide Spectrum of Winners*, 7 ALTERNATIVES 37, 42 (March, 1989).

THE L'AMBIANCE PLAZA MEDIATION

should provide new understanding of mass tort settlements. It should also prove useful to judges and litigators as they strive to adjust to the new demands made by settlement techniques, to deploy their personal and institutional resources more effectively, and to remain faithful to the underlying values of justice and fairness that the judicial system strives to serve.

The two L'Ambiance Plaza judges succeeded as mediators because they employed many of the techniques that behavioral scientists have determined are critical to a negotiated resolution of complex disputes. Specifically, the mediators were able to alter the parties' perceptions of the case, and of the potential results of full scale litigation, in order to make settlement appear the more attractive alternative. They were able to expand the disputed issues in order to create attractive opportunities for compromise and trade-offs. By incorporating all aspects of the litigation into the "global" settlement, the panel was able to expand the opportunities for linking issues and trading gains and losses, and to bring about an integrated settlement in which all parties could attain at least some of their main goals. Finally, the mediators instituted a process in which all participants had great trust and which, in many ways, duplicated for the parties the sense of justice and due process that is usually associated with traditional litigation. Some of the mediators' methods, however, led parties to participate in the mediation and settlement who had no actual or potential liability, raising serious questions about the ultimate fairness of the process.

For many reasons, L'Ambiance Plaza is a useful case to study. For one thing, it took place at a key point in the evolution of judicial ADR. After an initial period of experimentation, techniques such as mock jury trials, expert fact-finding and formal mediation through special masters or specially appointed judges became commonplace in many federal courts.¹⁴ The federal district court in New Haven had used such techniques before the L'Ambiance Plaza collapse. In fact, Judge Robert C. Zampano, the mediator who is credited with bringing about the settlement,¹⁵ was instrumental in bringing innovative settlement techniques to New Haven. For two years before L'Ambiance he had been designated special "settlement judge" and had devoted all his time to developing

14. D. PROVIN, *supra* note 5; Brazil, *supra* note 6.

15. Much information on the mediation in this article is derived from interviews with participants and with Judge Zampano. Without exception, the participants refer to Judge Zampano as the leader of the panel. Judge Frank S. Meadow, however, the Connecticut Superior Court Judge who served with Judge Zampano as the L'Ambiance Plaza Mediation Panel, contributed a great deal to the outcome of the mediation and served as crucial liaison to the state court system.

ADR methods in cases referred to him by other judges in the district.¹⁶ It is an opportune time, therefore, to evaluate these techniques analytically before they become entrenched in the courts. In addition, L'Ambiance is heuristically useful because of its size. It was small for a mass tort. Any air crash or hotel fire is likely to have many times the number of victims. But precisely because of its size, L'Ambiance allows us to view with relative ease the total environment of the dispute and to isolate factors that in larger cases might remain obscure.

Part one of this Article begins with a brief description of the accident and of the ultimate settlement. This is followed by an overview of the behavioral theories of negotiation and dispute resolution that will be employed to analyze the settlement process. Thereafter the Article analyzes the mediation process in detail, applying those theories to the events from the time of the collapse to the final settlement hearing. It concludes with a detailed evaluation of those factors that were key to the successful mediation effort and suggests a need to guard against the threat in any ADR method of overriding the demands of justice and the overall goals of the justice system to achieve the short term interests of the parties.

II. THE COLLAPSE

L'Ambiance Plaza was planned as a nine story moderate income housing facility consisting of two towers separated by a central courtyard. Bridgeport had been suffering from poor economic conditions for several years, and L'Ambiance was conceived of by some as the centerpiece of a new economic renaissance, encouraging investment in downtown real estate development that could lure some of the more glamorous corporate and financial tenants away from New Haven, Stamford and the intervening suburbs.¹⁷ On April 23, 1987, without warning, the partially completed structure collapsed inward in less than ten seconds.¹⁸ The precise cause of the collapse is still unclear. The United States Occupational Safety and Health Administration (OSHA) attributed it to defects in the unusual construction method used. L'Ambiance Plaza was built using the lift slab construction technique. This means that concrete floor

16. Zampano, *Senior Judge as Settlement Judge in the District of Connecticut*, at 4-5 (1986) (unpublished manuscript); Zampano, *Settlement Conferences With Experts* (1986) (unpublished manuscript); D. PROVIN, *supra* note 5, at 79-80. See also Zampano, *The Mini-Trial in Federal Court: A Judge's View*, in CENTER FOR PUBLIC RESOURCES, CORPORATE DISPUTE MANAGEMENT M-H 59 (1982).

17. Judge, *Lead Counsel Analyze Building Collapse Mediation*, *supra* note 13, at 92; interview with Edward Hennessey, attorney for the City of Bridgeport, in Hartford, Connecticut (June 19, 1989).

18. NBS INVESTIGATION, *supra* note 9, at 27-28.

THE L'AMBIANCE PLAZA MEDIATION

slabs were poured on the ground and then lifted, several at a time, by a hydraulic jack to the point where they could be attached to the steel columns framing the building. As each slab reached its correct position, it was attached, either temporarily or permanently, by a collar, or shearhead, which was welded to the slab and then attached to the columns.

OSHA concluded that the most probable cause of the collapse was the failure of the lifting system in the west tower, specifically the failure of a lifting angle at one of the shearheads as it was attached to the column.¹⁹ Others argued that a faulty engineering design, most probably having to do with the placement of tension wires stretched across each slab and cemented into the concrete, created an inherent weakness in the slabs. Still others claimed that excessive water in the soil beneath the building caused the concrete footings to shift downward, putting too much stress on the steel columns and causing the collapse. Another set of theories focused on the weakness in the concrete used to pour the slabs and to weld them to the shearheads.²⁰ The actual number of deaths could be attributed, in part, to the fact that workers were allowed to continue working under the slabs as they were lifted into place, in violation of OSHA regulations.²¹ Had the site been cleared the number killed would have been far less.²² The mediation panel concluded that there were multiple causes, and "widespread negligence, carelessness, sloppy practices,

19. *Id.* at v, 209. OSHA adopted the conclusions of the NBS Report. Its subsequent citations were based on violation of the general duty clause, 29 U.S.C. § 654(a) (1982) and general regulations on safety instruction, 29 C.F.R. § 1926.21(b)(2) (1989) and on lift slab, 29 C.F.R. § 1926.305(b) (1989). The latter requires that hydraulic jacks used in lift slab "have a safety device which will cause the jacks to support the load in any position in the event the jack malfunctions," and to install a control device "which will stop the operation when the ½ inch leveling tolerance is exceeded." 29 C.F.R. § 1926.305(b)(1),(2) (1989).

20. Information on alternative theories of causation was derived from interviews with several persons, including Kevin Coles, attorney for Texstar, Inc., in Bridgeport, Connecticut (Dec. 16, 1988); Joseph Egan, Business Agent, Local Union 424, International Association of Bridge, Structural and Ornamental Iron Workers, in New Haven, Connecticut (Nov. 10, 1988); Garrett Moore, attorney for plaintiffs, in New Haven, Connecticut (Oct. 12, 1988).

21. It takes several hours to lift a set of slabs into place. As a result, contractors like to keep other work in progress during the lifting. In commenting on proposed new OSHA lift slab regulations, Texstar stated that ". . . the economics of not allowing workers in the building during lifting would eliminate lift slab as a viable competitive system." 54 Fed. Reg. 16,132 (April 21, 1989).

22. Ironically, many construction workers considered lift slab a relatively safe process. Most deaths in the industry result from falls, and on a lift slab job fewer workers have to spend long hours high up on a scaffolding. Interview with Joseph Egan, *supra* note 20.

and complacency on the part of over twenty entities connected directly or indirectly to the construction of the L'Ambiance Plaza building."²³

The existence of so many theories of causation was a result of the large number of contractors involved in the project, and the need of each to shift the blame to the others. At the same time, as we shall see, spreading the blame over many entities eventually enabled the mediation panel to enlarge the linkages in the dispute and gather enough money to bring about the mediated settlement. Nineteen months after the collapse, on December 1, 1988, in New Haven, Connecticut, five different courts,²⁴ sitting simultaneously, approved a \$41 million settlement of all claims arising out of the collapse. Over seventy potential defendants²⁵ contributed to or participated in the settlement. The successful mediation was credited with avoiding up to ten years of litigation and appeals.

III. THEORIES OF NEGOTIATION AND DISPUTE RESOLUTION

The analysis of disputes has its genesis in the emergence of game theory, a discipline developed after World War II and applied mainly in the field of international relations.²⁶ In game theory some conflicts are described as zero-sum games, meaning that there is a finite resource to be divided, and any gain for one party (the winner) is accompanied by a commensurate loss to the other (the loser).²⁷ Litigation is in many ways a zero-sum game, in which there are absolute winners and losers.²⁸ One party gains something, usually money, and the other loses, or pays. The payment and the gain sum to zero. Even nonmonetary disputes are

23. Interim Report, L'Ambiance Plaza Mediation Panel 4-5 (Nov. 15, 1988) [hereinafter Interim Report].

24. The United States District Court for the District of Connecticut, the Superior Court of the State of Connecticut, Judicial District of Waterbury, the Connecticut State Probate Court, the Connecticut Workers' Compensation Commission, and the United States Occupational Safety and Health Review Commission.

25. Throughout the text, the term "defendant" will be used to refer to all the commercial entities involved in the mediation and settlement; the City of Bridgeport; the Connecticut Housing Finance Authority; and OSHA, although, as we shall see, only four of these were ever sued by the plaintiffs. The term "plaintiff" will be used to refer to all the victims of the collapse and all the personal representatives of those who were killed.

26. See, e.g., R. LUCE & H. RAIFFA, *GAMES AND DECISIONS* (1957); H. RAIFFA, *supra* note 10; T. SCHELLING, *THE STRATEGY OF CONFLICT* (1960); J. VON NEUMANN & O. MORGANSTERN, *THEORY OF GAMES AND ECONOMIC BEHAVIOR* (1944); I. ZARTMAN, *THE FIFTY-PERCENT SOLUTION* (1976).

27. T. SCHELLING, *supra* note 26, at 82-84; L. SUSSKIND & J. CRUIKSHANK, *BREAKING THE IMPASSE* 85 (1987). J. VON NEUMANN & O. MORGANSTERN, *supra* note 26, at 84-85.

28. Menkel-Meadow takes this view. Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, *supra* note 12, at 756; *Legal Negotiation: A Study of Strategies in Search of a Theory*, *supra* note 12, at 911. Other writers conceive of litigation somewhat differently.

THE L'AMBIANCE PLAZA MEDIATION

viewed this way. In a patent case, for example, the resource to be divided is the exclusive right to an idea. If one party wins that right, the other loses it. Zero-sum games, with their winner-take-all outcomes, are risky, uncertain, and expensive.

In a true zero-sum game, a negotiated agreement is difficult. One side is unlikely to agree to give up everything for the benefit of the other. Zero-sum games, therefore, including lawsuits, tend to result in solutions imposed by third parties such as judges. (Some such games are settled by other means, such as war or armed combat, but these are beyond the scope of this Article.) The fact that most lawsuits are settled out of court does not detract from their zero-sum nature. Solutions may be "imposed" in such cases because the law, either through precedent or legislation, dictates a certain result and the parties deem it useless to continue.²⁹ For other reasons, the parties might decide that some linear division of the resource at stake is preferable to continued litigation. The result is still usually a transfer of value from one to another, with a net result of zero.

It is possible, however, to view lawsuits as nonzero-sum games.³⁰ A nonzero-sum game is one in which there are outcomes that involve gains and losses for both sides.³¹ There are some outcomes that at least one party prefers that do not involve disadvantages for the other party.³² Parties may have different interests which can be mutually accommodated. While neither one might gain everything, neither will lose everything. The process of reaching a nonzero-sum solution is sometimes referred to as integrative bargaining, in which the different interests of the parties are integrated into an agreement with joint gains and shared losses.³³ In contrast, zero-sum games involve distributive bargaining: the subject of the dispute is distributed among the adversaries. Nonzero-sum, integrative solutions are usually, though not always, preferable to a winner-take-all outcome, because they offer the opportunity for solutions that would not be possible in a zero-sum game.

Pending lawsuits are nonzero-sum games to the extent that they include opportunities for settlement that involve mutual gain. In a dispute over money, for example, time becomes a factor that can lead the parties from distributive to integrative bargaining. The plaintiff may prefer a low payment today to a higher payment after a trial three years from

29. Menkel-Meadow, *Toward Another View of Legal Negotiation*, *supra* note 12, at 789.

30. Cooter, *supra* note 10; R. LEMPert & J. SANDERS, *supra* note 10, at 140 n.3.

31. *Id.* See also L. SUSSKIND & J. CRUIKSHANK, *supra* note 27, at 85-86.

32. *Id.*

33. H. RAIFFA, *supra* note 10, at 131; L. SUSSKIND & J. CRUIKSHANK, *supra* note 27, at 85-87.

now. The parties can integrate the plaintiff's interest in an immediate response to the defendant's interest in a low payout. Time, as we shall see, became a major factor in the L'Ambiance settlement. More complex cases offer even more opportunities for nonzero-sum solutions. To return to the example of a patent dispute, an arrangement for limited use of a patented process, with payment of royalties and some control by the original patent holder over future use, might be preferable to a litigated outcome in which the right to the patent is given exclusively to one party or denied entirely.

Two points are apparent from the foregoing analysis. One is that integrative solutions are, for the most part, beyond the powers of courts to impose. Litigated solutions are zero-sum solutions.³⁴ This leads to the second point: lawsuits are resolved through negotiated settlements because the parties perceive the possibility of an integrative resolution, and they perceive that such a resolution is preferable to its alternatives.

Disputes, including lawsuits, can be changed from zero-sum to nonzero-sum games, and the parties moved from distributive to integrative bargaining, when the parties' perceptions are changed so that they see opportunities for mutually satisfactory solutions.³⁵ This requires a search for linkages³⁶ or items to trade.³⁷ Theorists who seek to encourage such solutions frequently refer to the need to approach such disputes as problems to be solved jointly, by side-by-side "cooperative antagonists," rather than by adversaries across a bargaining table.³⁸

Generating linkages or trades means discovering joint interests of the parties which might not be apparent at the beginning of a dispute. It may also mean altering the environment of the dispute to increase the number of possible outcomes. For example, in addition to time, transaction costs are a factor in virtually every lawsuit. One of the parties, or a

34. There are exceptions to this statement, but they are rare. The Connecticut legislature, for example, recently enacted a preference for periodic payments of noneconomic damages over \$200,000 in personal injury actions, but then amended its statute a year later to return to lump sum payments absent the parties' agreement. CONN. GEN. STAT. ANN. § 52-225(d)(b) (West Supp. 1989), amending § 52-225(d)(c) (1987). Judges in domestic disputes often have discretion to impose creative resolutions as to custody and even property distribution. CONN. GEN. STAT. ANN. § 46b-80 (West 1986) and § 46b-56 (West 1986). Nevertheless, such examples are overshadowed by the overwhelmingly winner-take-all nature of litigation.

35. J. SUSSKIND & L. CRUIKSHANK, *supra* note 27, at 33, 78-79; Cooter, *supra* note 10, at 242; I. ZARTMAN & M. BERMAN, *THE PRACTICAL NEGOTIATOR* 13 (1982).

36. H. RAIFFA, *supra* note 10.

37. For an excellent popular description of this process, see R. FISHER & W. URY, *GETTING TO YES* ch. 4 (1981). See also L. SUSSKIND & J. CRUIKSHANK, *supra* note 27, at 86.

38. R. FISHER & W. URY, *supra* note 37; H. RAIFFA, *supra* note 10, at 18. See also Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, *supra* note 12, at 758.

THE L'AMBIANCE PLAZA MEDIATION

third party, may take steps to increase or decrease these costs, in order to highlight cost savings as another area of joint interest that can be exploited to reach a solution. Noticing lengthy depositions is one example of such behavior. Like time, the costs of litigation were a major factor in the L'Ambiance Plaza mediation, and one which was used extensively by the mediators to encourage settlement.

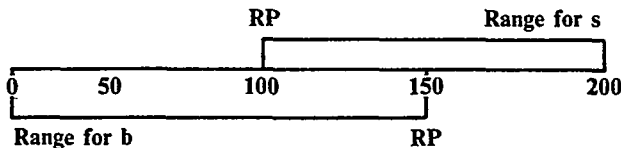
In another aspect of dispute resolution analysis, several theorists have created models of bargaining behavior to describe the negotiation process.³⁹ Such models, like other social science models, are based on the assumption that actors in disputes behave rationally, and therefore we should be able to predict how they will behave once certain variables are specified. Models are useful in viewing both zero-sum and nonzero-sum situations. Typically these consist of a linear representation of the variables that will or will not lead to settlement. One party, a seller, for example, multiplies its target, or hoped-for sales price by its estimate of its probability of ultimate success in getting that price. The seller then subtracts the expected costs of losing the sale, and the result is the amount at which the seller should be willing to sell. This figure is sometimes termed the reservation price (RP) meaning the point below which no agreement is preferable to agreement.⁴⁰ To arrive at the buyer's RP, one performs a similar computation. If the results overlap, the dispute should settle, and the settlement should fall within the range of the two numbers.⁴¹

This model mirrors to some degree what most negotiators do intuitively, with far less precision. Negotiators usually have in mind some outcome, either in dollars or other factors, that they consider a minimally acceptable outcome, or RP. The RP should be based on the probability of expected gain or loss and expected costs. This is the bottom line, the least amount one will settle for. While not all disputants

39. Posner, *supra* note 10; Priest & Klein, *supra* note 10; Landes, *supra* note 10; H. RAIFFA, *supra* note 10; R. LEMPERT & J. SANDERS, *supra* note 27, at ch. 6.

40. H. RAIFFA, *supra* note 10, at 37.

41. H. RAIFFA, *supra* note 10, at 57-65. At its simplest level, such a representation looks like this, if *s* is the Seller and *b* is the Buyer:



Id. at 57. Decision tree analysis is another method often used in analyzing disputes from the perspective of the decision makers. Decision trees attempt to quantify the risks at any given point in the negotiations. *Id.* at 74-76.

consciously articulate an RP, even to themselves, its existence is a given if one is to assume rational negotiating behavior. The extent to which the parties' reservation prices overlap determines whether a negotiated solution is possible and at what amounts. If my top price is twenty dollars and your bottom line is fifteen dollars, we should be able to agree on some price between those numbers, even if you begin by asking thirty-five dollars and I insist on ten dollars. Integrative bargaining in this model consists of determining the true RPs of the participants.

Closely linked to the reservation price (RP) is the notion of a BATNA, or Best Alternative to a Negotiated Settlement.⁴² It refers to the projected outcome should negotiations fail to generate a settlement. In a lawsuit, a BATNA is full scale litigation, with its attendant costs and risks. Presumably, and again assuming rational actors, one's reservation price will depend on one's BATNA. A reservation price should not be worse than a BATNA. Moreover any lower outcome is not an efficient solution, and arguably not a fair or just outcome either, assuming that an outcome worse than the law would impose is not just.

In litigation, the RP can be arrived at mathematically by taking the amount at stake and multiplying that by the probability of success at trial, and then adding or subtracting future transaction costs. By performing this calculation for both sides, one can determine whether settlement is possible. Again, experienced litigators behave this way intuitively. If the plaintiff's RP, or minimum demand, is less than the defendant's RP, or maximum offer, the case will settle, presuming the plaintiff's RP is based on the estimated outcome times the probability of success at trial, less the costs of trial plus the costs of settlement. Conversely, the defendant's maximum is based on the probability of plaintiff's success times the probable amount of loss after trial, plus the costs of trial less the costs of settlement.⁴³

This model presents problems when one wants to describe integrative bargaining, in which a number of variables can be combined so that many potential solutions are possible. In such a dispute, the RP would have to represent the one integrated solution out of many that would be

42. R. FISHER & W. URY, *supra* note 37, at 104.

43. R. POSNER, *ECONOMIC ANALYSIS OF LAW* 522-28 (3d ed. 1986). Posner's formula for estimating settlement is:

$$P_p J - C + S < P_d J + C - S$$

or, $(P_p - P_d)J < 2(C - S)$

If "J is the size of the judgment if plaintiff wins, P_p is the probability of the plaintiff's winning as estimated by the plaintiff, and P_d is the defendant's estimate of that probability. C and S are the costs to each party of litigation and of settlement, respectively." *Id.* at 524. See also Landes, *supra* note 10, at 101-06. But see Wittman, *Is the Selection of Cases for Trial Biased?* 14 J. LEGAL STUD. 185 (1985).

THE L'AMBIANCE PLAZA MEDIATION

minimally acceptable to the parties. Other combinations of variables would not be represented. Moreover, a linear equation cannot account for the analytical process that led to the conclusion that a single combination of variables was the RP.⁴⁴ Instead, more elaborate models are needed, which can graph or otherwise represent a range of solutions, many of which might be mutually acceptable outcomes.

Labor negotiations provide a helpful example of this need for more elaborate models. Imagine that the parties are bargaining over annual wage increases, medical benefits and a day care center. Different percentage wage increments can be combined with different medical benefit plans and the day care center to yield a large number of possible combinations. The parties could each place a numerical value on each combination of solutions and then create a graph to represent visually all possible outcomes. These outcomes are sometimes termed a negotiation set.⁴⁵ The graph would delineate those outcomes that should be acceptable to both parties. In this way such a model would yield a series of best, or most efficient, solutions by mathematically determining solutions in which one party gains and the other, at the least, does not lose. Such solutions are sometimes referred to as a Pareto optimal set, or the efficient frontier.⁴⁶ The efficient frontier can be mathematically determined, based on the values placed by the parties on the multiple issues and

44. Menkel-Meadow, *Toward Another View of Legal Negotiation*, *supra* note 12, at 793-94.

45. H. RAIFFA, *supra* note 10, at 133-42.

46. R. LEMPERT & J. SANDERS, *supra* note 10, at 144-45.

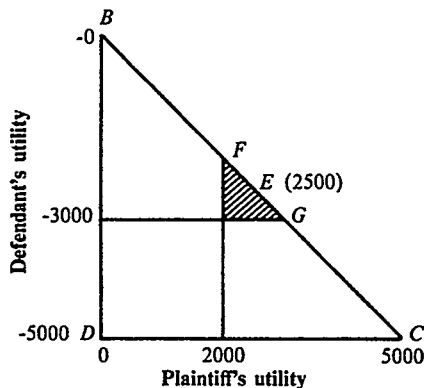


Figure 6.3

"The line connecting points F and G constitute what is called a *Pareto optimal set*. All points along this line are optimal in the sense that once one point on this line is chosen, there is no other outcome that is better for *both* parties. Furthermore, points off this line

items in dispute.⁴⁷ The value of such models for dispute resolution is that they can be used by the participants or by third parties such as mediators to determine whether and on what terms settlement ought to occur.⁴⁸

Models are also useful in clarifying the dynamics of negotiations by showing how a change in one factor in a dispute affects the likelihood of settlement. Modeling demonstrates not only the relationships among the factors in dispute; it shows the impact of a change in one or more factors on the eventual outcome.⁴⁹ Anything that alters a party's RP changes the chances for overlap, or agreement. Similarly, expanding the number of issues to be resolved or valuing the combinations of issues differently affects the efficient frontier. Conversely, removing some items from the table lessens the chances of settlement.

IV. THE ROLE OF THIRD PARTIES

The models just described carry major implications for the role of third parties in legal dispute resolution. They add an entirely new dimension to traditional notions of the role of mediators or other third party dispute resolvers by demonstrating that mediators are most effective when they do three things: (1) determine the parties' interests and the way the parties value different options; (2) create more accurate estimates of the factors that determine settlement; and (3) generate new options by exploring interests not originally apparent and, sometimes, by creating new linkages that can be factored into the settlement equation. For example, a mediator can learn from the parties what their true interests are and what interests have priority over others. In traditional litigation, or in other disputes, the parties rarely reveal to each other accurate information about their RPs. Mediators can also change a party's RP by providing an objective and reliable estimate of the merits of the claims, or by educating the parties about how juries have decided comparable cases in the recent past. Moreover, mediators might suggest options and linkages not previously identified by the parties, and then analyze possible out-

but in the negotiation set may leave both parties worse off than they would be if they settled at some point on this line." *Id.* See also H. RAIFFA, *supra* note 10, at 99-103, 139.

47. H. RAIFFA, *supra* note 10, at 158-64, 177.

48. *Id.* at 236-45. Raiffa and others cited here have developed highly sophisticated quantitative models of negotiation behavior that are beyond the scope of this Article. Interested readers are urged to pursue these materials to experience the complexity and richness in options available for the application of behavioral research to legal disputes.

49. For an excellent discussion of the use of modeling by third parties, see *Id.* at chs. 15 & 16; L. SUSSKIND & J. CRUIKSHANK, *supra* note 30, at 163, 179-80; Raiffa, *supra* note 10.

THE L'AMBIANCE PLAZA MEDIATION

comes involving such new items. Mediators can thus enlarge the parameters of the dispute by expanding the issues in dispute.⁵⁰ They can do all this at an early stage, before the parties have invested too much in a litigated solution. In other words, mediators, or other third parties, can change the factors in the equations used for modeling disputes, and in so doing, increase the chance of settlement.

Judges are especially effective at applying these methods of mediation. A judge's opinion on the expected value of a case is respected because it represents the solutions that other judges are likely to impose without a negotiated settlement.⁵¹ Through the prestige of office and the resources available to them, judges can use tools such as mock jury trials or expert advisory panels to bring about similar revisions in perception.⁵² In addition, by ruling on motions or controlling the calendar, they alter the actual items in the settlement equation. A motion ruling may change radically the probabilities used by the parties to arrive at their RPs. A change in trial schedule will alter the value of time as a factor in settlement.⁵³ The mediators in L'Ambiance Plaza exhibited many of these behaviors in molding the parties' settlement decisions.

Of course, analysis of a dispute should not ignore the traditional functions of a mediator. These include:

1. Creating effective procedures for joint problem solving. Mediators often focus on process, including determining times and places for meetings and ground rules for discussions.

2. Initiating negotiations. Sometimes the parties are reluctant to make the first move towards negotiations for fear of appearing weak or uncertain of the strength of their case. A mediator can perform an important service just by opening communications.

3. Creating trust and empathy. One of the most important roles of a mediator is to create a situation in which the parties can reveal their true interests in a setting of trust. Mediators must work to build trust in themselves as mediators, trust in the mediation process, and, finally, trust between the parties.⁵⁴ Creating a forum in which the parties can honestly reveal their goals and priorities is very important. Some disputes settle as soon as each side has the chance to tell the mediator, a sympathetic listener, their story of what happened. Successful mediators

50. Lynch & Levine, *supra* note 5. See also authorities cited *supra* note 48.

51. Lynch & Levine, *supra* note 5; Brazil, *supra* note 6, at 35.

52. Posner, *supra* note 10, at 371; D. PROVIN, *supra* note 5, at 68; Lambros, *supra* note 6, at 466.

53. Schuck, *supra* note 1, at 358.

54. See, e.g., Colosi, *Negotiation in the Public and Private Sectors*, 27 AM. BEHAV. SCI. 229, 242-43 (1983).

say that sometimes people just need someone to talk to, or cry with them, to make them responsive to a negotiated agreement.⁵⁵

4. Proposing solutions. Activist mediators, including judges, see their role as studying the case in order to propose solutions which create opportunities for joint gains. As we have seen, this role is best understood in an analytical framework in which solutions are valued and then compared as to relative value.

5. Maintaining fairness. A mediator cannot be effective without taking responsibility for the fairness and integrity of the process. This role requires a delicate balance. The mediator must remain objective, and not inject his or her own values into the settlement; nevertheless the mediator must guard against solutions that are unfair to one or more parties. The mediator is also responsible for redressing any power imbalances that exist among the parties. The procedures must also be kept fair, with neither party given greater access to information than the others, and finally, the mediator must resist the temptation to pressure the parties into a settlement just to see the process succeed. To some degree, the mediator is also responsible to the system in which the dispute takes place, and to the larger social system as well, to see that the process and agreement do not offend any basic societal or systemic values. Judges as mediators have certain advantages in fulfilling all these functions. They can make the resources of the judicial system available to the parties. They can propose negotiations and they have the prestige to bring even the most reluctant parties to the bargaining table.⁵⁶

In L'Ambiance Plaza, judges acted as mediators and effectively addressed all these traditional functions. In addition, they influenced behavior by altering parties' perceptions and enlarging the items in the dispute. The latter factors were critical to the eventual success of the mediation.

V. THE COLLAPSE AND EARLY LITIGATION

Judicial mediation of the L'Ambiance Plaza litigation began in January, 1988. Up to that point, the litigation had gone through two phases, the first involving a Bill of Discovery to determine whom to sue, and the second the filing of tort suits against three key defendants. Immediately after the collapse, the plaintiffs filed a Complaint in the nature of a Bill

55. See *Pilot Insurance ADR Project Results in Many Settlements*, 7 ALTERNATIVES (CPR) No. 3 at 37, 40 (March, 1989).

56. Raiffa calls judges "mediators with clout," meaning that because of the power of the office, parties are reluctant to appear uncooperative or unreasonable. Raiffa, *supra* note 10; see also Schuck, *supra* note 1, at 357-58.

THE L'AMBIANCE PLAZA MEDIATION

of Discovery against eleven defendants, including the property owner, the general contractor on the site, and the City of Bridgeport. This is an equitable discovery device, rarely used today, that dates back to the beginnings of English common law. Originally it was used to obtain the testimony of adverse parties when such testimony was not admissible at trial, and to compel production of physical evidence before the advent of the subpoena duces tecum.⁵⁷ More recently it has been used to gain information needed for an action pending or about to be brought, when the plaintiff can show no adequate remedy at law, that is, no means of obtaining the information through traditional discovery devices.⁵⁸

The plaintiffs' ostensible reason for bringing the Bill of Discovery was consistent with its earliest uses. They had to identify all the contractors and entities involved with the project to find out whom to sue.⁵⁹ They also wanted a quick way to obtain an attachment on the property, and they wanted to preserve potential evidence from destruction during the clean-up process. In general, the Bill of Discovery functioned to get the Connecticut courts involved quickly, so that speedy judicial remedies were available when necessary.⁶⁰ The attachment, early identity of potential defendants, and at least some protection of the materials from the site were the immediate tangible outcomes of the suit. The Bill of Discovery also served as a forum in which plaintiffs' counsel and, to a much lesser extent, defense counsel, organized and began to cooperate in the litigation.

By the end of 1987, the second, and major phase of the litigation had begun. The plaintiffs filed tort suits against three defendants:

—L'Ambiance Plaza Limited Partnership (LPLP), the owner and developer of the site, and the corporations and individuals that were its partners;⁶¹

—Texstar Construction Co., the subcontractor responsible for lifting the concrete slabs into place by means of a system of hydraulic jacks;

57. G. STEPHENSON, CONNECTICUT CIVIL PROCEDURE § 136 (2d ed. 1982).

58. *Pottetti v. Clifford*, 146 Conn. 252, 150 A.2d 207 (1959).

59. The Complaint sought discovery of all entities and persons connected with the development and/or construction project and their insurers. It also sought preliminary documents relating to the project. *Palardy v. Delwood Dev. Int'l*, No. 239871 (Conn. Super. Ct. May 9, 1987). Potential defendants included the owners, developers, general contractor, multiple subcontractors, product suppliers, and public agencies that provided funding or authorization for the project.

60. The plaintiffs obtained an injunction against transfer or destruction of any materials from the site. *Collelo v. Delwood Dev. Int'l*, No. 239872 (Conn. Super. Ct. May 19, 1987). The Bill of Discovery was granted as to most requests for identification of potential parties. In the Matter of L'Ambiance Plaza, No. 239822 (Conn. Super. Ct. Aug. 12, 1987).

61. *Delwood Development International, Inc., William DeLeo, S. Paul DeLeo, and William Lone*.

—the city of Bridgeport, for alleged negligence in inspecting and approving the plans and granting the building permit and in inspecting the site during construction.

The plaintiffs sued LPLP and Texstar in state and federal court to avoid jurisdictional problems. They sued the city in state court in the judicial district of Waterbury.⁶² More suits were planned for filing in early 1988.

By this time the Occupational Safety and Health Administration (OSHA) had levied the biggest fines in its history against five of the L'Ambiance contractors for multiple, willful violations of OSHA standards and the OSHA general duty clause.⁶³ The OSHA charges were based on an investigation and report by the National Bureau of Standards, now the National Institute of Standards and Technology,⁶⁴ which was to become the basis for most of the early liability claims. The contractors cited by OSHA were: Texstar Construction Corporation, fined \$2,519,000; TPMI/Macomber, fined \$2,475,000; Lift Frame Builders, Inc., fined \$104,000.; Fairfield Testing Lab, Inc., fined \$10,000 and Preforce Corporation, fined \$1,000.⁶⁵ OSHA also referred the matter to

62. *Rusillo v. L'Ambiance Plaza Limited Partnership, et al.*, No. B 88-135 (WWE) (D.Conn. 1988); *Daddona v. L'Ambiance Plaza Limited Partnership*, CV 88 00836705 (Conn. Super. Ct. 1988); *Daddona v. Texstar Construction Corp.*, CV 88 128 (D.Conn. 1988); *Seiwart v. Texstar Construction Corp.*, CV 88 0084343 (Conn. Super. Ct. 1988); *Daddona v. City of Bridgeport*, CV 87 0082647 (Conn. Super. Ct. 1988). The federal cases were consolidated before U.S. Judge Warren Eginton in Bridgeport. The state cases were consolidated before Judge James T. Healy in the Judicial District of Waterbury and designated "L'Ambiance Plaza Litigation (PID)."

63. An employer can either be charged with violating a specific OSHA standard or with violating the OSHA General Duty Clause, 29 U.S.C. § 654 (1982), obligating employers to maintain a place of employment "free from recognized hazards causing or likely to cause death or serious physical harm." 29 U.S.C. § 654(i). The L'Ambiance defendants were cited for numerous violations of the general duty clause, including allowing people to work under the slabs as they were lifted; engineering errors; improper use of fill around the foundation; lifting without adequate lateral bracing; defective welds; and other errors in the lifting jacks. They were also cited for violating standards regarding instruction in safe work procedures, 29 C.F.R. 1926.21(b)(2) (1989); and regarding the operation of the hydraulic lifting jacks, 29 C.F.R. 1926.305(a)(1) (1989). See *supra* note 19.

64. NBS INVESTIGATION, *supra* note 9.

65. *Secretary of Labor v. Texstar Constr. Corp.*, No. 87-1956, Region I, Settlement Agreement (United States Occupational Safety and Health Review Comm'n, Nov. 18, 1988); *Secretary of Labor v. Lift Frame Builders, Inc.*, No. 87-1738 Region I, Settlement Agreement (United States Occupational Safety and Health Review Comm'n, Nov. 21, 1988); *Secretary of Labor v. TPMI/Macomber, A Joint Venture*, No. 87-1955, Region I, Settlement Agreement (United States Occupational Safety and Health Review Comm'n, Nov. 18, 1988); *Secretary of Labor v. Fairfield Testing Lab, Inc.*, No. 87-1957, Region I, Settlement Agreement (United States Occupational Safety and Health Review Comm'n, Nov. 18, 1988); *Secretary of Labor v. Preforce Corp.*, No. 87-1893, Region I, Settlement Agreement (United States Occupational Safety and Health Review Comm'n, Nov. 18, 1988).

THE L'AMBIANCE PLAZA MEDIATION

the U.S. Department of Justice for consideration of criminal prosecution of the main lift slab contractor, Texstar.⁶⁶

Judicial mediation of the L'Ambiance claims can be divided roughly into two periods: January to July, 1988, in which the panel gathered information, established relationships with all parties, and obtained general commitments to participation in the process, and August to December, 1988, during which the panel obtained definite agreements from each party as to specific sums of money and other contributions to the final settlement.

A. *The Mediation - Phase One*

The federal tort suits were referred to Judge Warren Eginton in Bridgeport. In January 1988, Judge Eginton approached United States District Judge Robert C. Zampano, Senior District Judge for the District of Connecticut, and asked him to consider trying to settle the L'Ambiance suits before litigation proceeded too far. Judge Zampano, assigned permanently to ADR in the New Haven federal court,⁶⁷ agreed. However, because suits had already been filed in both state and federal court, Judge Zampano decided to work with Connecticut Superior Court Judge Frank S. Meadow in order to gain jurisdiction over all the cases. Together, the two were appointed the L'Ambiance Plaza Mediation Panel, the first such joint federal-state mediation effort devoted to a mass tort.

By the time the panel became involved, plaintiffs' attorneys had organized into a Plaintiffs' Attorneys Committee (PAC), with a smaller Plaintiffs' Steering Committee (PSC), ready to coordinate litigation and mediation activities. An expense fund was set up, with initial contributions based on the nature of the claims (death or personal injury) and the expected value of each. Later expenses were to be assessed out of any ultimate recovery.⁶⁸ The defendants were less united initially because each party was more concerned with placing blame on the others than

66. The Justice Department eventually decided not to prosecute. Felsen, *Mediation That Worked: Role of OSHA in L'Ambiance Plaza Settlement*, 3 J. OF PERF. OF CONSTRUCTED FACILITIES 212 (1989). A similar investigation by the Connecticut State Police also failed to result in any criminal charges. *Connecticut Department of Public Safety, Bureau of State Fire Marshal*, News Release April 6, 1988, at 2 ("After reviewing the investigative results, both State's Attorney Donald Browne and Chief State's Attorney John Kelly agreed that there was insufficient basis for criminal prosecution because the cause of the collapse involved neither intentional nor negligent criminal conduct.")

67. See *supra* text accompanying note 16.

68. Interview with Richard A. Bieder, lead counsel, Plaintiffs' Attorneys Committee, in Bridgeport, Connecticut (July 13, 1988).

resolving the dispute. One or two attorneys who represented key clients did, nevertheless, emerge as spokespersons during the early court hearings on the Bill of Discovery.⁶⁹

When the mediation began, the key legal and factual issues had begun to take shape. To a degree, the OSHA report made up for the lack of discovery and enabled the mediators to suggest with some credibility, even at the first meetings, which entities were likely to be held responsible, and why. It is useful at this point to summarize the legal issues that had thus far emerged at the beginning of the litigation.

B. *The Plaintiffs' Issues*

1. *Workers' Compensation.* For the plaintiffs, the most important legal issues had to do with Connecticut Workers' Compensation law. Under the exclusive remedy rule, Workers' Compensation is an employee's sole recourse against an employer for death or injury on the job.⁷⁰ Because all the L'Ambiance plaintiffs were injured or killed on the job, they were barred from suing their own employers at common law. The victims could pursue tort claims against any responsible third party, but even this possibility was severely limited by a state law enacted to protect employers in industries such as construction where there are several contractors and subcontractors with employees exposed to injury. Under the principal employer rule, as codified in Connecticut and elsewhere, any contractor who subcontracts out part of the work is protected from common law tort actions brought by any employees of its subcontractors, and is responsible for paying Workers' Compensation to subcontractors' employees as well as its own.⁷¹ The two doctrines together shield contractors from common law tort actions by the employees of their subcontractors. As a result, the plaintiffs in L'Ambiance could successfully bring tort claims only against entities below or parallel to their own employers in the contractual chain, assuming they could prove liability on the facts.

69. Interview with Kevin Coles, attorney for Texstar Construction Corp., in Bridgeport, Connecticut (Dec. 26, 1988).

70. CONN. GEN. STAT. ANN. § 31-284 (West 1987 & Supp. 1989). *Daily v. New Britain Mach. Co.*, 200 Conn. 562, 512 A.2d 893 (1986); *Jett v. Dunlap*, 179 Conn. 215, 425 A.2d 1263 (1979); *DeSantis v. Gaudioso*, 39 Conn. Supp. 222, 476 A.2d 149 (Conn. Super. Ct. 1983).

71. CONN. GEN. STAT. ANN. § 31-291 (West 1987). After the L'Ambiance collapse, Connecticut amended its Principal Employer Statute to provide immunity only when a principal employer has actually paid compensation benefits to the injured worker or his family. CONN. GEN. STAT. ANN. § 31-291 (West Supp. 1989) The L'Ambiance litigation, however, was controlled by prior law, protecting upstream contractors even when they had not provided Workers' Compensation coverage.

THE L'AMBIANCE PLAZA MEDIATION

The plaintiffs hoped to circumvent the exclusive remedy rule by utilizing the "dual capacity" doctrine. In some states, an employer who acts in a second capacity, as a product supplier, for example, is liable at common law for injuries caused in that second capacity.⁷² The Connecticut courts have so far been unwilling to create exceptions to the exclusive remedy rule.⁷³ The L'Ambiance defendants, however, were never sure that the Connecticut courts would continue to interpret the rule so strictly. With such compelling facts, a court might hold that a subcontractor who made a product used on the site, such as the shearhead collars, was a product supplier and strictly liable for damages caused by a defect in the product. Moreover, the defendants suspected that few trial judges would be willing to grant summary judgment based on an exclusive remedy defense in such a highly visible case. There would have to be a trial and perhaps appeals to finally settle the issue.

2. *Immunity.* The plaintiffs claimed negligence against the City of Bridgeport and the Connecticut Housing Finance Authority (CHFA), neither of which was shielded from common law liability by the Workers' Compensation statutes. They hoped to show that both were liable for negligence in approving the engineering specifications for the building and in failing to supervise and inspect the construction in progress. However, as a rule public officials are protected by immunity from such claims unless a plaintiff can show that the official wrongfully performed a ministerial, rather than a discretionary, duty.⁷⁴ As part of its 1986 Tort Reform effort, moreover, Connecticut's legislature had explicitly immunized municipalities and their officials from liability for the issuance of any permit when to do so involves a discretionary function. The only exception is for reckless disregard for health or safety.⁷⁵ The plaintiffs, therefore, had to meet a heavy burden when they pursued their claims against the city.

72. *Bell v. Industrial Vangas, Inc.*, 30 Cal. 3d 268, 637 P.2d 266, 179 Cal. Rptr. 30 (1981); *Duprey v. Shane*, 39 Cal. 2d 781, 249 P.2d 8 (1952).

73. *Mingachos v. CBS, Inc.*, 196 Conn. 91, 491 A.2d 368 (1985). While L'Ambiance was pending, the Supreme Court once again refused to liberalize its interpretation of the rule. *Panaro v. Electrolux Corp.*, 208 Conn. 589, 545 A.2d 1086 (1988).

74. *Wright v. Brown*, 167 Conn. 464, 356 A.2d 176 (1975); *Pluhowsky v. City of New Haven*, 151 Conn. 337, 197 A.2d 645 (1964). See Maccarrone, *Connecticut Tort Reform Act and Municipalities and Building Officials' Liability*, 20 CONN. L. REV. 203 (1987).

75. CONN. GEN. STAT. ANN. § 52-557n(b) (West Supp. 1989).

C. *The Defendants' Issues*

The key legal issues for the defendants, including those who had not yet been sued,⁷⁶ concerned contract and indemnity claims, Workers' Compensation, and OSHA fines. The panel often referred to all these as the "commercial claims."

1. *Contract Claims.* A large problem the defendants had to overcome was their attitude. They thought of themselves as plaintiffs or as victims of the collapse instead of perpetrators. They were not paid for work they had performed, they lost the value of jobs they had contracted to perform, and the firms most heavily implicated in the collapse were in or close to bankruptcy.⁷⁷ The city had large claims for reimbursement for its cleanup and rescue costs, and CHFA was intent on foreclosing on its mortgage. Most contractors and the owner-developer really were plaintiffs in a variety of upstream and downstream contract claims for subrogation, indemnification, or breach of contract. L'Ambiance Plaza Limited Partnership (LPLP) believed, however, that it had been the victim of negligence by one or more subcontractors, and it relied on an indemnity clause in its contract with TPMI/Macomber entitling it to indemnification for all its losses under Connecticut law.⁷⁸ Its rights against TPMI, which had hired and supervised those subcontractors, were further secured by a \$12 million performance bond on which George Macomber was personal surety. To the extent that LPLP collected, Macomber stood to lose. TPMI/Macomber intended to pursue its indemnification rights under its contract with Lift Frame.⁷⁹ LPLP also had a builders' risk policy that it claimed covered it for all losses stemming from the destruction of the building.

Indemnity can be implied as well as express. A subcontractor who is determined to be a "primarily liable party,"⁸⁰ may be held liable to other

76. See *supra* note 25 and *infra* text accompanying notes 99 and 100.

77. Texstar Construction Corp. had filed a petition in bankruptcy in Texas where it had its principle place of business. Lift Frame Builders, Inc. and George Macomber had lost several other contracts after the collapse. TPMI went out of business after losing approximately \$14 million in contracts. Interview with Thomas Murtha, attorney for TPMI/Macomber, in Bridgeport, Connecticut (July 18, 1988).

78. *Alpha Crane Service, Inc. v. Capital Crane Co.*, 6 Conn. App. 60, 504 A.2d 1376 (1986), *cert. denied*, *Aparo v. United Technologies Corp.*, 199 Conn. 807, 508 A.2d 769 (1986).

79. J. SWEET, *SWEET ON CONSTRUCTION INDUSTRY CONTRACTS: MAJOR AIA DOCUMENTS*, AIA Document A401, Standard Form of Agreement Between Contractor and Subcontractor, P. 4.6 (1987).

80. *Therrien v. Safeguard Mfg. Co.*, 180 Conn. 91, 429 A.2d 808 (1980); *Kaplan v. Merberg Wrecking Corp.*, 152 Conn. 405, 207 A.2d 732 (1965). See also J. SWEET, *supra* note 79, at 291-92.

THE L'AMBIANCE PLAZA MEDIATION

contractors who suffer loss as a result of its negligence.⁸¹ Thus Texstar and Lift Frame and other subcontractors who were allegedly responsible for the collapse had to defend themselves against their colleagues, even as they pursued their own claims to recoup some of the devastating economic losses they had suffered. There were also numerous upstream claims by various entities seeking payment for work they had done either on the job or during the rescue effort. Some of these were secured by a payment bond posted by TPMI/Macomber. Others were unsecured. The claims for clean up work were substantial, many reaching hundreds of thousands of dollars.

2. *Tort Reform.* Recent tort reform legislation in Connecticut further encouraged the multiplicity of defendants' claims. In 1986, the legislature abolished joint and several liability, a doctrine that made any one tortfeasor liable to the plaintiff for the full amount of the damages, with the ability to seek indemnification against the co-tortfeasors in separate proceedings.⁸² In its place, the legislature made tortfeasors liable only for their proportionate share of recoverable damages, but to take advantage of this new rule all defendants must be joined in the original plaintiffs' case.⁸³ The result in the case of L'Ambiance Plaza was to create strong incentives for each contractor to bring into the mediation every other party on the site with any potential liability.

3. *Workers' Compensation.* In addition to all of the tort and contract claims there were claims of the various Workers' Compensation carriers, who were subrogated to the plaintiffs' negligence and products claims against third parties. Even though many of the contractors were shielded from direct actions by the plaintiffs, a contractor who pays (or whose insurance carrier pays) Workers' Compensation is by statute entitled to subrogation as to any employee's claim against a third party for damages, up to the amount of compensation paid.⁸⁴ In L'Ambiance Plaza, the Workers' Compensation carriers insisted that they be able to pursue their subrogation rights against any contractors who were primarily liable for the accident. Those claims, moreover, would be based on exactly the same proof of negligence as a suit by the employee would have

81. *Alpha Crane Service, Inc. v. Capitol Crane Co.*, 6 Conn. App. 60, 77, 504 A.2d 1376, 1386, cert. denied, *Aparo v. United Technologies Corp.*, 199 Conn. 807, 508 A.2d 769 (1986).

82. *Fox v. Fox*, 168 Conn. 592, 362 A.2d 854 (1975); *Gionfriddo v. Gartenhaus Cafe*, 15 Conn. App. 392, 546 A.2d 284 (1988).

83. CONN. GEN. STAT. ANN. § 52-572h (West Supp. 1989). The statute was amended after the L'Ambiance collapse but before suits were filed, and the parties anticipated significant disputes construing the new statute and deciding which version would apply.

84. CONN. GEN. STAT. ANN. § 31-293 (West 1987). The employer may sue the third party directly or may join in a suit brought by the employee to recover for past or future compensation payments.

been.⁸⁵ The total claims for subrogation of compensation payments came to over \$1 million by the time of the settlement.

4. *OSHA*. OSHA pursued its own interests in L'Ambiance Plaza. To maintain its credibility as a serious enforcement agent of workplace safety, it cited five defendants for willful violations of the Occupational Safety and Health Act, and levied total fines of over \$5 million.⁸⁶ In view of the magnitude of the deaths and what the agency considered reckless disregard by the contractors of their statutory duties there was no doubt that OSHA considered this a major case that it wanted to prosecute fully.⁸⁷ OSHA's two main goals were to sustain its charges of willful violations and to impose a significant penalty. At the same time, the agency recognized that for humanitarian reasons it would probably have to reduce its initial fines. There was not enough money, from insurance coverage or other assets, to meet the plaintiffs' demands and still pay the fines. The plaintiffs' attorneys from the start made the point to the public that every dollar to OSHA would be a dollar taken from the victims' wives and children.⁸⁸ The defendants contested the OSHA citations, so the case proceeded to a hearing before an administrative law judge for the Occupational Safety and Health Review Commission (OSHRC) for the Boston Region.⁸⁹

D. *Lift Frame Builders - An Example*

Lift Frame Builders furnishes a perfect example of the complexity of defendants' claims. Lift Frame was at the center of the liability controversy because it was the lift slab contractor in charge of all lift slab work done on L'Ambiance Plaza and it came out fighting. It sued everyone it could, and as a result found itself sued in return. Lift Frame first filed suit against Bridgeport alleging negligence in the permit and inspection process. It also intervened in the plaintiffs' suits asserting its subrogation rights as a payor of Workers' Compensation. It sued TPMI/Macomber for payment due under its contract. TPMI/Macomber, through its performance bond carrier, counterclaimed for indemnification based on the same contract. Texstar was brought into this suit as a third party defendant, and it immediately counterclaimed against Lift Frame. At the

85. *DeSantis v. Gaudioso*, 39 Conn. Supp. 222, 476 A.2d 149 (Conn. Super. Ct. 1983); *Cirrito v. Continental Can Co.*, 519 F. Supp. 638 (D. Conn. 1981).

86. See *supra* text accompanying notes 64 and 65.

87. Felsen, *supra* note 66, at 3.

88. *Id.*

89. Eventually the hearing was stayed pending the outcome of the mediation. See *infra* note 96.

THE L'AMBIANCE PLAZA MEDIATION

same time, several subcontractors of Lift Frame sued it demanding contract damages.⁹⁰ Lift Frame also took the lead in the defense against the OSHA citations and its own \$104,000 fine.

VI. MEDIATION STYLES AND EMERGING THEMES

Against this background, the mediation panel took on the task of resolving all these issues and divergent interests into a cohesive and fair settlement. Judge Zampano and Judge Meadow were very strong, activist mediators.⁹¹ From the beginning, they played a strong management role, setting timetables, creating and sticking to a strict schedule, and fashioning the details of the settlement. In many ways the panel acted more as nonbinding arbitrators than as mediators. The judges made known their own conclusions as to the responsibility for the collapse. They also decided which entities should be brought into the mediation process, which of those were most likely to be held responsible for the deaths and injuries, and the precise amount of each plaintiff's settlement package, which they presented on a take it or leave it basis. Of the two judges, Judge Zampano was the more activist, and he is often credited with the mediation's success. Judge Meadow, however, played a key support role. He worked out the details of the process and the settlement amounts with Judge Zampano and made sure the state courts respected the informal stay needed for a successful mediation. Zampano, however, with his experience in ADR, made most of the key decisions that shaped the process.⁹²

Early in the mediation a key strategy developed by the two judges was that they would not play the traditional mediator's role of helping the parties to negotiate their own agreement.⁹³ In fact, the parties were deliberately kept from interacting with one another. Virtually all negotia-

90. Interview with Jeffrey A. Blueweiss, attorney for Lift Frame Builders, Inc., in Bridgeport, Connecticut (August 26, 1988).

91. They typified what two authors have termed "muscle mediators." J. FOLBERG & A. TAYLOR, *MEDIATION* 130 (1984), reprinted in *DISPUTE RESOLUTION*, *supra* note 7, at 101 ("In muscle mediation the mediator, sometimes resembling a 'closet arbitrator,' tells the parties what is fair and appropriate. Muscle mediators. . . inform the disputants of the best 'voluntary' resolution or narrow the options to preclude effective choices.")

92. This conclusion is based on numerous interviews with participants in the mediation and with those who observed the process closely. One attorney suggested that the two judges were perfectly matched to the task at hand. Judge Zampano, a natural leader and skilled at interpersonal relations, was the perfect choice to win the cooperation of the diverse parties involved. Judge Meadow was content to play a quieter role, providing critical input and support but never attempting to compete for control or leadership.

93. See L. SUSSKIND & J. CRUIKSHANK, *supra* note 27, at 140-50, 162-65; D. PROVIN, *supra* note 5, at 21-24.

tion was between the mediation panel and the individual parties. The best visual image of the L'Ambiance mediation is that of a solid rubber ball with spikes protruding from it in all directions. The ball is the judicial system, the largest part of which is the mediation panel. Some of the spikes are plaintiffs, some are defendants, many are both, depending on the various relationships among the different spikes. They only communicate with one another through the center ball, either by participating in the mediation process or by (occasionally) filing motions in court. So strictly was this pattern adhered to that no plaintiff knew what any other plaintiff would receive, and no defendant knew how much any other had paid until the very end of the process when the agreements were announced in open court and became a matter of public record.⁹⁴

By January 25, 1988, the two judges had sent a memo to all parties and potential parties, notifying them of the mediation and requesting all attorneys to stop filing new suits and to postpone any further pretrial procedures, including discovery, except as necessary for compliance with any statute of limitations or other time requirements.⁹⁵ The state and federal courts cooperated in staying further proceedings.⁹⁶

This early start to mediation, only nine months after the collapse, gave the panel an important strategic advantage. The most expensive discovery and motion practice lay ahead. By imposing an unofficial stay on further litigation, the panel was able to keep the costs of settlement low and the costs of continuing to litigate extremely high by comparison. Only the OSHA administrative proceedings continued, and those were eventually stayed as well.⁹⁷

One problem for the panel was obtaining the cooperation of all the entities that had not yet been sued. The ease with which this was done

94. Even the insurance carriers that insured more than one defendant took care to handle each insured's defense separately. The Hartford, for example, did not know the total amount it would pay into the settlement until the week before the agreements were finalized. Interview with Harold Levy, General Counsel, and Jeffrey Norris, Associate Counsel, The Hartford Insurance Group, in Hartford, Connecticut (Feb. 16, 1989). Although some members of the Plaintiffs' Steering Committee knew the contents of all the plaintiffs' settlement offers, none revealed these figures to their clients. Interview with Richard Bieder, lead counsel, Plaintiffs' Steering Committee, at Pound Ridge, New York (Dec. 9, 1988).

95. "L'Ambiance Plaza Litigation: State-Federal Mediation Panel," Memo to all parties, January 25, 1988.

96. The Connecticut Supreme Court also cooperated by delaying any ruling on the appeal of Lift Frame from certain testing orders granted by Judge Landau.

97. Marselli, *Judge Awaiting Mediation in L'Ambiance Plaza*, The Bridgeport Post, July 26 1988, at 10. The stay was critical to Judge Zampano's strategy, and he pressed OSHA to agree to it. Zampano wanted to avoid any investigation by the defense that might inject new liability issues into the mediation discussions. He sensed early that success depended to a great degree on maintaining a high level of uncertainty as to the merits of the various claims.

THE L'AMBIANCE PLAZA MEDIATION

provides an interesting example of the enormous powers judicial mediators have at their disposal. Ultimately, all the potential defendants came to the mediation sessions after receiving letters from Judge Zampano and Judge Meadow inviting them to attend. The judges themselves recognized the difficulties in obtaining this degree of cooperation.⁹⁸ The potential defendants' initial decision to attend the mediation sessions was due in part to the prestige of the judges requesting their presence. As one lawyer noted, "You don't lightly turn down a request from a federal judge."⁹⁹

For several reasons, the mediation had to include potential as well as actual defendants. From the beginning it was apparent that there was no single deep pocket defendant. The Bill of Discovery had revealed a large number of grossly underinsured entities. The owners of the property had a \$1,000,000 liability policy, as did the general contractor. The two lift slab contractors, Lift Frame and Textstar, carried \$3.5 million and \$3 million respectively, the two largest policies available.¹⁰⁰ The city of Bridgeport was self-insured and nearly bankrupt. To obtain enough money for forty-two plaintiffs' claims, there would have to be contributions by many different entities.

The mediation panel met with plaintiffs and defendants throughout February, March, and April 1988.¹⁰¹ At all of the meetings, parties were told to appear not only with their attorneys, but also with their principles or any other persons with settlement authority. Judge Zampano met with the Worker's Compensation carriers that had been paying benefits on behalf of all the victims, and he also traveled to Boston to meet with OSHA's Regional Representatives.

The panel did not seek a firm commitment from anyone on a fixed amount of money at these early meetings. Instead, at the close of each meeting, the parties were asked to merely indicate whether they would commit to continuing with the mediation, whether they were "on board"

98. "In requesting that persons meet with the Mediation Panel, the Mediation Panel noted that it had no power to order them to appear, but stated it believed there were 'strong social and moral' reasons for them to do so." Interim Report, *supra* note 23, at 6. See also L'Ambiance Plaza Litigation State-Federal Mediation Panel 3 (Jan. 25, 1989).

99. There is an analogy in the Agent Orange settlement for a judge bringing nonparties into a case for negotiation purposes. Judge Weinstein, when he took over the Agent Orange litigation, ordered the United States and several chemical companies into the discussions, even though a previous judge had dismissed them from the case. The first judge, Weinstein maintained, had never signed a formal judgment of dismissal. P. SCHUCK, *supra* note 11, at 114.

100. Information extrapolated from the list of Contributions to Death and Personal Injury Settlement Fund, Special Settlement Proceedings, In Re: L'Ambiance Plaza Litigation, (Dec. 1, 1988), which indicate the amount contributed by each defendant.

101. Interim Report, *supra* note 23, at 8.

or not. In addition, the judges accomplished several critical preliminary tasks. They gathered information about potential theories of liability, learned how much insurance coverage was available and what other assets could be reached if necessary, and identified other potential defendants and determined which defendants planned to file contract claims and for how much.¹⁰² Whenever any new entity was mentioned, it was contacted by the panel and asked to come to a meeting. Any entity mentioned in the OSHA and state police reports was contacted by the panel and asked to appear. The net was thus cast wider and wider, until over seventy defendants were involved, many of whom had only the remotest connection to L'Ambiance. One midwestern attorney was summoned to meet with the panel, for example, because his client had made a testing instrument used by Fairfield Testing, even though there was never any suggestion that the instrument had any connection to the collapse. Another supplied some screws that were used in some of the shearheads, but was also never cited as having anything to do with the collapse.¹⁰³

In this way Zampano tried to bring together enough parties to create a settlement fund big enough to satisfy the plaintiffs' minimum needs. To justify the presence of so many minor defendants, he did two things: he threatened everyone with long and expensive potential litigation, and he suggested that those who participated would also have their commercial claims resolved as part of the mediation. Consequently, this stick and carrot approach enabled Zampano to ultimately bring about the global settlement.

Several themes emerged at these early mediation sessions that were carefully calculated to bring the parties to agreement. One theme was the major cost of continuing litigation, both financial and emotional. The case would involve "hundreds of parties and over a thousand causes of action," he wrote to the parties. It would create "profound emotional stress and economic strain."¹⁰⁴ He and Judge Meadow would "make every effort to settle the several hundred pending and potential lawsuits generated by the collapse."¹⁰⁵ By the end of April the panel had met with "over 250 parties, potential parties, lawyers, representatives of in-

102. *Id.* Interview with Judge Robert C. Zampano, United States District Judge, District of Connecticut, in New Haven, Connecticut (June 24, 1988).

103. Interview with George Holmes, attorney for Fairfield Testing Laboratory in Fairfield, Connecticut (Sept. 19, 1988), and interview with Edward Hennessey, attorney for the City of Bridgeport, in Hartford, Connecticut (June 19, 1989).

104. L'Ambiance Plaza Litigation State-Federal Mediation Panel 1 (Jan. 25, 1988).

105. Memorandum to Plaintiffs - L'Ambiance Plaza Litigation, from Hon. Robert C. Zampano, Hon. Frank S. Meadow, L'Ambiance Plaza Mediation Panel (Apr. 29, 1988).

THE L'AMBIANCE PLAZA MEDIATION

surers, and other interested persons," and over fifty people were still to be interviewed.¹⁰⁶ These ideas were repeated at every mediation session.

Judge Zampano also kept everyone acutely aware of the time it would take to litigate all the cases. Seven to ten years was the most frequent estimate for concluding all trials and appeals. By settling, everybody could put the collapse behind them and get on with their lives, or their businesses. For all of the small contractors and subcontractors, and even for the developers, this struck a responsive chord. Most of the defendants were small business people who had to resolve the case to get back in business. Even the city of Bridgeport was strongly motivated by this notion of finality. As long as the case dragged on, it would be like a skull and crossbones looming over Bridgeport, kept in the public mind because the press would highlight every move in the litigation. Above all, Mayor Tom Bucci wanted to get the matter done with.¹⁰⁷

Another theme was uncertainty. The legal issues as to liability and even some of the commercial claims were not clear-cut. No party could be confident of success on the merits. Zampano and Meadow deliberately kept any discussion of the legal issues out of the mediation.¹⁰⁸ One party had prepared a three inch thick loose-leaf binder full of research on why it could not ultimately be held liable to the plaintiffs. When the party first met with the panel, Judge Zampano announced, "I don't want to hear any law, any facts, any theories of liability. I just want to know how much you are going to pay."¹⁰⁹

When the attorneys did allude to the merits, Zampano was always discouraging, especially to the defendants. When Zampano addressed the defendants he stated over and over that a jury would simply look at the tragedy, see an available defendant, and then award the moon. All you have to do, suggested Zampano, is to show a picture of the site the day before and the day after the collapse, tell the jury these are the participants and these are the deaths and injuries, and the jury will award the plaintiffs what they ask.¹¹⁰ The jury would see "those widows in their black dresses holding their rosaries for the rest of their lives," was one of his favorite expressions. To the plaintiffs, he repeatedly noted that even if they won a substantial jury verdict, that verdict would have to withstand numerous appeals, and afterwards would probably be uncollectible. Most of the contractors would be out of business or bankrupt by

106. *Id.*

107. Interview with Edward Hennessey, *supra* note 103.

108. Interview with Judge Robert C. Zampano, United States District Judge, District of Connecticut, in New Haven, Connecticut (Jan. 17, 1989).

109. Interview with Edward Hennessey, *supra* note 103.

110. Interview with Harold Levy, *supra* note 94.

the time they actually had to pay any damages. Whatever a jury awarded, the plaintiffs would receive little more than the insurance coverage held by each defendant, and that was available now.¹¹¹

The third theme throughout the mediation was the moral imperative that arose from the terrible nature of the tragedy, and the need to do the right thing by getting some quick relief to the victims' families. Zampano always kept the discussions "on the moral high ground."¹¹² The defendants were especially susceptible to this approach. According to one attorney, all the defendants "hate to see anyone get killed," and they all wanted to contribute something to the settlement.¹¹³ Construction workers, whether bosses or laborers, are a close-knit group. Some of the contractors had relatives among the victims.¹¹⁴ Most of them had worked closely with their employees for years, and often appeared on behalf of the plaintiffs before the mediation panel.¹¹⁵ To the City of Bridgeport and to OSHA, Zampano hammered away at the public nature of the tragedy and the public interest of government to help settle the case. The judges capitalized on these issues to such an extent that at times the process seemed less like a lawsuit and more like a charity pledge drive to help the L'Ambiance Plaza victims.

At the meetings both judges also sought to establish the parties' trust in the mediation process. Trust was established and maintained in three ways. First, the panel was thoroughly knowledgeable about the case. Before any meetings with the parties, Judge Zampano spent days going through the files and learning all he could about L'Ambiance and other mass torts. He never ceased educating himself about every aspect of the case. Before meeting with the Workers' Compensation carriers, for example, he traveled to New York City to confer with an expert in compensation and subrogation.¹¹⁶ At every mediation session he garnered information on the parties' theories of the case and the bases for their

111. Interview with Richard Bieder, *supra* note 94; interview with Garrett Moore, liaison counsel, Plaintiffs' Steering Committee, in New Haven, Connecticut (Oct. 12, 1988).

112. The initial memo to the parties from Judge Zampano concluded, "Finally, we recognize that many persons and entities requested to attend the mediation sessions have no legal obligation to do so. However, Judge Meadow and I firmly believe that there is a strong social and moral obligation to do so, and we urge your cooperation." L'Ambiance Plaza Litigation State-Federal Mediation Panel (Jan. 25, 1988). All attorneys interviewed noted this factor.

113. Interview with Thomas Murtha, *supra* note 77.

114. One of the principals in Texstar had a nephew who was killed. Interview with Kevin Coles, *supra* note 69.

115. Interview with Judge Robert C. Zampano, *supra* note 108.

116. *Id.*

THE L'AMBIANCE PLAZA MEDIATION

claims against other entities. His goal was always to be ready to answer every allegation and every argument that could arise.¹¹⁷

Second, the judges dealt directly with the parties. Attendance at mediation sessions was mandatory for attorneys and their clients,¹¹⁸ meaning anyone with authority to settle. Plaintiffs (the legal representatives of the deceased victims, and the actual victims in the personal injury cases) were requested to come, along with their attorneys, to the mediation sessions. Other family members could attend if they wished. Defendants were to appear with trial counsel, the CEO of the corporation and in-house counsel. Insurance companies had to appear with trial counsel, claims managers, and in-house counsel. Finally, any individual had to appear with an attorney, and the city of Bridgeport had to be represented by its trial counsel, the mayor, and corporate counsel.

This approach was important for a number of reasons. It helped to establish trust and confidence in the judges on the part of the parties themselves. It gave to the proceedings a sense of justice and fairness, at times seeming, in the minds of the participants, to replicate the due process they would have expected from a full trial of the case. Each party had an opportunity to tell his or her story directly to the judges. The fact that these judges had no actual power to grant them any relief made very little difference to the parties. They had an opportunity to be heard by a very sympathetic listener who embodied the prestige and power of the judicial system.¹¹⁹ Judge Zampano is able to generate enormous respect and affection from lay people who are involved in litigation, be-

117. On the importance of a judge being well-informed before beginning settlement discussions, see Brazil, *supra* note 6, at 28.

118. "It is *mandatory* that *trial* attorneys attend the mediation sessions. An attorney who is or expects to be on trial on that date shall *forthwith* inform the presiding judge of his commitment before the mediation panel. If difficulty is encountered in being released to attend a mediation session, *immediately* inform either Judge Meadow or Judge Zampano of the problem." L'Ambiance Plaza Litigation State-Federal Mediation Panel app. A (Jan. 25, 1988).

119. Judge Zampano took every possible opportunity to communicate his sympathy to the plaintiffs. On April 29, 1988, for example, the panel sent a letter to announce the individual plaintiffs' meetings. In that letter Judge Zampano wrote, "Judge Meadow and I express our sincerest condolences to you on the anniversary of the tragic L'Ambiance Plaza Building collapse. The terrible effects of the catastrophe undoubtedly bring daily remembrances and sorrows; the anniversary only heightens the sadness as the disaster is 'relived' in memory and media. You have our deepest sympathy." The letter also became an opportunity to stress, once again, the themes that Judge Zampano hoped would make settlement attractive: the urgent need to settle early, "to decrease the profound emotional stress and economic strain upon the victims. . .," the panel's intent to make "every effort to settle the several hundred pending and potential lawsuits generated by the collapse;" the fact that the judges had "conferred with over 250 parties, potential parties, lawyers, representatives of insurers, and other interested persons"; and that "[m]uch more needs to be done" Memorandum to Plaintiffs - L'Ambiance Plaza Litigation, from Judge Robert C. Zampano and Judge Frank S. Meadow, L'Ambiance Mediation Panel (Apr. 29, 1988).

cause he is a master at demystifying the legal system. By dealing directly with the parties, he established a personal relationship with everyone who had the ability to make the ultimate settlement decision. At each session he made sure that each participant had a chance to speak and was respected by the panel and the other participants, no matter how contentious the discussions.

Third, the panel insisted on, and maintained, complete confidentiality throughout the proceedings. The initial memo from the two judges indicated that, "[t]he mediation sessions shall be regarded as confidential, 'off the record,' and informal. All oral statements and documents shall be deemed submitted for settlement purposes only."¹²⁰ The confidential nature of the proceedings was stressed often at the mediation sessions.

The first meeting with the plaintiffs exemplified Judge Zampano's character and his approach as a mediator. On March 1, 1988, the panel met with all the plaintiffs, their attorneys, and any family members who wanted to be there. The Judge appeared without a robe and began by expressing his deep sympathy for their loss. He told them he understood how hard it was to lose a close relative in a sudden accident because he himself had experienced the same kind of loss. He continued by explaining the mediation process and the alternatives available, putting the alternatives in a very negative light. A trial might take as long as seven years, to be followed by appeals. He also explained in detail the state and federal court systems and the differences between civil and criminal cases. This was followed by a discussion of the role of mediators and his view of the mediation process. He explained the Connecticut Tort Reform Act, and the difficulties it presented for the plaintiffs. The plaintiffs and their families were encouraged to ask questions and discuss their opinions. One plaintiff, the brother of a decedent, articulated a plan to lobby for repeal of the Tort Reform Act. Another, whose son was killed, discussed how he formed the Bridgeport Safety Awareness Group (BSAG), and he distributed BSAG literature.¹²¹

At this first round of meetings, Judge Zampano moved the parties towards integrative bargaining by stressing the themes of costs, complexity, time, uncertainty, morality, and trust. He made the parties' alternatives to settlement very unattractive by keeping the probability of success uncertain at best. He made graphic the advantages of trading time for dollars; settling early for less money would in the end net the parties far more than any other resolution. In addition, Zampano increased geomet-

120. L'Ambiance Plaza Litigation State-Federal Mediation Panel 2 (Jan. 25, 1988).

121. Interview with Linda Grossberg, paralegal assistant, Koskoff, Koskoff and Bieder, P.C., lead counsel, Plaintiffs' Steering Committee, in Bridgeport, Connecticut (June 6, 1988).

THE L'AMBIANCE PLAZA MEDIATION

rically the opportunities for integrative, nonzero-sum bargaining by bringing in numerous potential parties and by putting the commercial claims on the table. While such methods may appear to make the case more complex and expensive to litigate, it ultimately created opportunities for trade-offs that made settlement attractive. Eventually, these techniques would bring the parties to the point where their reservation prices, and thus their interests in settlement, converged.

VII. A SETTLEMENT PROPOSAL

The next step in the mediation process was to create actual proposals for settlement. The panel had a good estimate of the money available, mostly through insurance, from the defendants. The panel also concluded that certain defendants were more culpable than others and so should be required to contribute more to the settlement. Though not revealed at first, three categories of defendants were established by the panel so as to better allocate contributions to a settlement fund. Group One included those parties primarily responsible for the collapse. Group Two included those parties with "questionable responsibility in terms of potential liability;" and Group Three included those with no potential liability.¹²²

The parties that made up Group One consisted of the owner-developer, the general contractor, Lift Frame, Texstar, the architects, the suppliers of concrete, Fairfield Testing Laboratories, the city of Bridgeport and CHFA. These parties were expected to contribute their total insurance coverage and, in some instances, their personal assets.¹²³ Group Two defendants were asked to contribute a percentage of total policy limits, and Group Three defendants were asked only for their "estimated costs of defense."¹²⁴ Group Three included companies that the panel expected might be brought into future litigation and so would have to face defense costs, in spite of their lack of involvement with the collapse.

122. Interim Report, *supra* note 23, at 13.

123. *Id.* See also Memorandum to All Parties, Potential Parties, and Interested Persons, from the L'Ambiance Mediation Panel, Re Death and Personal Injury Cases - Final Settlement Conferences (July 21, 1988) [hereinafter Memorandum to All Parties]. Those contributing personal assets were TPMI/Macomber, Texstar, Liftframe, George Macomber, and Delwood Development International, Inc., the general partner in L'Ambiance Plaza Limited Partnership.

124. Interim Report, *supra* note 23, at 13.

Plaintiff's Package

Even though the commercial claims had been brought into the negotiations, both Judge Zampano and Judge Meadow assumed that once the personal injury claims were resolved, the other matters in dispute would also settle. They therefore turned to the task of setting an actual settlement figure. During June, 1988, the panel met separately with each of the plaintiffs and their representatives. Victims' families and friends came with their attorneys to Judge Zampano's chambers, where they talked about the deceased, his family life, his work, his hobbies, the kind of person he was, and the hardships faced by his survivors. Photo albums were passed around. A television and VCR were on hand for viewing videos of the victims and their families. Several of the witnesses were survivors of the collapse. They told of watching their friends die and of the long and fruitless rescue attempts. "It was like going to twenty-eight wakes and twenty-eight funerals," said Judge Zampano of these meetings.¹²⁵

The judges called these "informal 'hearings in damages,'" ¹²⁶ but they were much more. For the plaintiffs, the individual meetings served more than anything else as substitutes for a trial. Moreover, the meetings were another opportunity for the panel to build the trust and respect of the plaintiffs in the judges and in the mediation process. The meetings also had a practical purpose. Attorneys were told to present summaries of each plaintiff's economic damages: lost wages, estimates of future earnings and fringe benefits, and life expectancy.¹²⁷ Judges Zampano and Meadow also questioned the families closely about their needs. "Tell me about your dreams," Judge Zampano asked.¹²⁸ He wanted to learn of any special expenses faced by each family. Some had a sick or disabled

125. Interview with Judge Robert C. Zampano, *supra* note 103. Emotionally, these meetings were the worst part of the case for Judge Zampano. Interview with Judge Robert C. Zampano, *supra* note 109. Attorneys for the plaintiffs also talked about how painful these sessions were. One of the rescue workers, an ironworker, told the panel that he had heard about the collapse on the radio, while on vacation in Georgia. Knowing that a close friend, whom he had brought into the ironworkers union, was on the site, he was unable to sleep that night. Finally he got up, drove straight to Bridgeport, and went immediately to the site to join the rescue effort. "I dug until my hands were torn and bleeding," he told the judges. Then he collapsed, sobbing, unable to continue. Interview with Richard Bieder, lead counsel, Plaintiffs' Steering Committee, in Bridgeport, Connecticut (July 13, 1988). Another lawyer prepared a videotape of two girls whose father had been killed. Both this attorney and Judge Zampano reported being moved to tears whenever this tape was shown. Interview with Judge Robert C. Zampano, *supra* note 108; interview with Garrett Moore, *supra* note 112.

126. Memorandum to All Parties, *supra* note 123, at 1.

127. Interview with Richard Bieder, *supra* note 125.

128. Interview with Judge Robert C. Zampano, *supra* note 108.

THE L'AMBIANCE PLAZA MEDIATION

child or an elderly parent to support. Others faced large debts, or the expenses of a college education.

By the end of June, the two judges believed they could fix the minimum amount that would be needed to settle all the personal injury and death cases. They had established a rough estimate of how much money might be available from the defendants. On July 21, the panel sent a memo scheduling what it called the "Final Settlement Conferences" in the death and personal injury cases.¹²⁹ On September 9, 1988, the panel distributed separate opinions indicating a minimum settlement amount for each plaintiff.¹³⁰ All of the plaintiffs had two weeks to respond. The amounts were eventually presented as nonnegotiable, all-or-nothing packages. For the mediation to continue, the plaintiffs had to unanimously accept the proposals.¹³¹ This tactic placed considerable pressure on the plaintiffs. No one wanted to be responsible for sabotaging the entire mediation.

The July 21, 1988, memo also scheduled meetings with groups of defendants "to secure the minimum settlement fund" and to "discuss and draft the appropriate papers."¹³² But the defendants were forewarned: there would be meetings to draft papers for settlement, but also to draft "the appropriate moving papers so that the plaintiffs can prosecute their actions against the 'non-settling defendants' by way of formal judicial proceedings in state and federal forums."¹³³

This seemed quite an optimistic plan as of July 21, 1988, particularly because no defendant had yet committed to pay anything. The memo served, however, as another source of pressure on all the parties, creating the impression that considerable momentum was building towards settlement and that no one would want to risk litigating alone. The memo again noted the high price of litigation: "[W]hile these dates and attendance requirements may be inconvenient to some, they certainly will be exceedingly less inconvenient than the weeks, months, and years of in-

129. Memorandum to All Parties, *supra* note 123.

130. *Id.* at 1. The opinions represented a minimum amount that the panel believed would constitute a fair settlement in each case. In the end, the actual awards were higher because more was contributed by the defendants. The awards were carefully tailored to each family, depending on the number and age of the victims' dependents, past earnings, needs of the surviving families and, for the injured plaintiffs, the extent of the injuries and their future needs. For a summary of the basis for the awards, see Interim Report, *supra* note 23, at 11. Payments to families with children included lump sums plus structured payments to last for several years or, in some cases, for life, each based on estimates of the costs of care and education. Parents or elderly relatives received lump sums.

131. Interview with Judge Robert C. Zampano, *supra* note 108.

132. Memorandum to All Parties, *supra* note 123.

133. *Id.* at 2.

convenience involved in discovery, depositions, and trial if these cases are not settled at this time."¹³⁴

By September 9, 1988, the minimum settlement proposals were delivered to the plaintiffs' steering committee, and by September 22, 1988, all of the plaintiffs had accepted. The panel worked hard to prepare the plaintiffs for settlement. Immediate payment was perceived as far better than litigating against possibly judgment-proof defendants. The amounts were well within the parameters of an acceptable settlement, given the costs of continuing the litigation and the probabilities of ultimately collecting a jury verdict. The next, and most difficult phase of the mediation was about to begin.

VIII. THE MEDIATION - PHASE TWO

A. *The Commercial Claims*

The awards accepted by the plaintiffs were, in Judge Zampano's words, "minimum settlement figures."¹³⁵ If the panel could obtain more, the plaintiffs would receive more. The minimum awards totalled \$24 million. Next, the panel negotiated with the defendants to reach a commitment for that amount. The panel estimated from its earlier meetings with the defendants that it could collect at least \$21 million, based on what the defendants and their insurers had tentatively committed. The judges' first concern was to make up the difference of \$3 million. They planned to negotiate the "global settlement" as a second and distinct step in the process, assuming that once the personal injury claims were resolved, the other disputes would fall into place.¹³⁶ That assumption eventually proved faulty.

Surprisingly, the state of Connecticut made up the original \$3 million discrepancy. In an incident that Judge Zampano attributed to "superhuman" intervention, he received a phone call in September from an aide to the governor of Connecticut. The aide inquired as to how the mediation was proceeding and whether the state could help things along. "You are standing on the ship of state with life preservers in your hands," replied Zampano, "and you are asking a drowning man if you should throw him one." Eventually the state contributed the \$3 million to the

134. *Id.*

135. *Id.* at 1.

136. *Judge, Lead Counsel Analyze Building Collapse Mediation, supra* note 13, at 93-95.

THE L'AMBIANCE PLAZA MEDIATION

settlement fund.¹³⁷ Now the panel had to secure the remaining \$21 million.

First, on September 27, 1988, Meadow and Zampano met with the Group One defendants.¹³⁸ It became immediately apparent that no one would commit any money to the plaintiffs' settlement fund without a resolution of all of the remaining claims at the same time. Ironically, by bringing so many entities into the negotiations, Zampano created a larger potential settlement fund than initially anticipated, but he had also expanded the defendants' expectations that their contract claims would be resolved.¹³⁹

The owner/developers, LPLP, were especially adamant on this point.¹⁴⁰ LPLP, in addition to the personal injury claims, faced foreclosure of a \$2 million construction mortgage. To meet its potential liabilities, LPLP had to pursue its substantial downstream claims against TPMI/Macomber on its \$12 million performance bond and against other subcontractors that might share in responsibility for the collapse, as well as against the city of Bridgeport and CHFA.¹⁴¹ LPLP's attitude was that it had done nothing wrong, so it faced no real threat from the plaintiffs. Its strong indemnity claims against TPMI/Macomber, and its contract indemnification claims against other downstream defendants such as Texstar, gave it the power to jeopardize the entire settlement. The other defendants, even if they agreed to the personal injury settlement, would have had to defend virtually identical claims by LPLP.

Many other defendants were unable to commit anything to the plaintiffs' claims unless they knew they could recover at least something from other defendants by way of contract or bond claims. LPLP, for example, was being asked for its policy limits plus a contribution from the assets of its principles, which it may have agreed to pay if it could have been assured of indemnification from TPMI's performance bond. George Macomber, of TPMI/Macomber, had posted a \$12 million performance bond, but he had to personally indemnify the bonding company. To the extent that he contributed to the plaintiffs fund out of his personal assets, he would have been unable to make good on his indemnity agreement, let alone settle the subcontractors' claims. The same was true of

137. Remarks of Judge Robert C. Zampano, Special Settlement Proceedings (Dec. 1, 1988).

138. See *supra* text accompanying notes 122-124.

139. Interview with Judge Robert C. Zampano, *supra* note 108.

140. Besides LPLP, included in this group were TPMI/Macomber, and the principles of LPLP, Lift Frame Builders, Texstar, O'Kon & Co., TPM Architecture/Kent Seyffer, Fairfield Testing Laboratories, and Preforce Corp.

141. Like the plaintiffs, LPLP had alleged claims against the city and CHFA based on negligence in approving the building plans and supervising the construction in progress.

the principles of Texstar and Lift Frame, the other companies with performance bonds. Meanwhile, the OSHA defendants continued to argue that every dollar paid in fines was a dollar unavailable to pay the plaintiffs. While this was not necessarily true as to the proceeds of liability insurance policies, which could not be used to pay OSHA fines, it was a persuasive point as to any claim against the defendants' personal assets. Conversely, legal fees and discovery expenses supposedly saved by settling with the plaintiffs would have to be paid anyway to defend the OSHA citations. For many defendants, there was simply no incentive to settle with the plaintiffs without tradeoffs involving the commercial claims.

The city and CHFA met with the panel after LPLP had left, with much the same result. Both were fairly confident of defeating the negligence claims brought against them. Yet CHFA was being asked to pay damages, or to give up its rights as mortgagor, with very little to gain except the legal fees it might save by an early agreement. These were not enough to compensate them for the value of the property, even in its present condition. The mayor of Bridgeport wanted to settle, but he faced a severe budget crisis. Before recommending to the city council that some of its scarce tax revenues be paid to the L'Ambiance plaintiffs, he wanted some reimbursement for its cleanup costs.¹⁴²

From the beginning, considerable tension surfaced between the Group One defendants and Judges Zampano and Meadow. Zampano was genuinely surprised that the commercial claims could be such a stumbling block, and the defendants responded that they had always insisted on settling all the claims at once. They were willing to contribute to the plaintiffs' fund, but only on the condition this contribution would "buy their peace" with the other litigants.

Zampano himself was in a very difficult position. He had promised many defendants that he would not ignore their commercial claims if they would agreed to contribute to the plaintiffs' fund. He also knew that many contractors feared embarrassment if they gave in while others who "hung tough" were ultimately let out of the settlement. He had promised that this would not happen, and he would lose considerable credibility if he could not achieve a global settlement.

Equitably the commercial claims were more difficult than the personal injury claims to settle. Asking for money for the victims' families is very

142. The state legislature declared that "a financial emergency exists in the town and city of Bridgeport" and established the Bridgeport Financial Review Board to oversee the city's financial affairs until it can achieve financial stability in the form of balanced operating funds budgets. 1988 CONN. SPEC. ACTS 88-80.

THE L'AMBIANCE PLAZA MEDIATION

different than asking for funds to pay a contractor.¹⁴³ No one claimed the plaintiffs were responsible for what happened, but everyone claimed that some of the contractors were responsible, and those same contractors were now demanding compensation. These contradictions were inherent in the global settlement. To get the minimum amount of money for the plaintiffs' fund, Zampano had to stress that multiple parties bore some of the blame for the tragedy. But, in order to create a commercial settlement fund, he had to minimize the responsibility of many contractors who were supposed to be paid for at least part of their claims. All the mediators' skills had to be turned towards making sure these contradictions did not overwhelm the settlement process.

Over the next two weeks both judges met several times with the Group One defendants and with other subcontractors. Plaintiffs' counsel were called to meetings in order to provide still stronger theories of liability or information that could be used to put more pressure on the defendants to settle. Various alternatives to a global settlement were proposed, most of which involved the settlement of some claims while leaving others to be litigated or mediated later. No one, however, could agree on who would be left out of the settlement. Each party wanted to settle with the entity most important to it, either the one it felt it had the best claim against or the one with the most threatening claim against it. As one attorney said, they were discussing creating a "limited war" against key defendants, but everyone wanted someone else to be left in the war.

Sometimes Zampano and Meadow left the parties to talk among themselves, thus temporarily breaking the earlier pattern of channeling all communications through the panel. Zampano asked TPMI/Macomber representatives to evaluate all the contract claims and to negotiate for the panel with its numerous subcontractors. As the general contractor, it was in the best position to decide which claims were valid and which were exaggerated. TPMI, moreover, was liable for all the bills presented by the subcontractors, so they were helping themselves by helping the judge pare down the contract claims.¹⁴⁴

Eventually the outline of a commercial settlement fund was pieced together, with commitments from the Group One defendants and the subcontractors. Four more key entities had to be won over before final settlement of the commercial claims. These were CHFA, the city of Bridgeport, the Workers' Compensation carriers, and, most importantly, OSHA. The city of Bridgeport was anxious to settle by October, 1988, but its severe budget crisis limited the funds it could make available. The

143. Interview with Judge Robert C. Zampano, *supra* note 108.

144. Interview with Thomas Murtha, *supra* note 77.

mayor's goal was to rid Bridgeport of the large hole in the ground that reminded people of the city's problems. Bridgeport's role in the settlement was highly visible; the local newspaper printed everything it could on L'Ambiance. The city wanted desperately to be viewed as cooperative and willing to help the victims, and it did not want to risk being accused of sabotaging the settlement. On the other hand, with more homeless people than any other city or town in the state, in addition to a high rate of unemployment, it had other large claims on its limited resources. The city had difficulty politically justifying a payment of a million dollars or more for forty-four families, many of whom were not residents, while it was having trouble providing basic services to its own citizens.

For Bridgeport, as for CHFA, the breakthrough came when a new item was injected into the discussions, creating new opportunities for mutual gains: the rebuilding of L'Ambiance Plaza. Early in the mediation process, some of the parties had suggested that the land, already subject to the CHFA mortgage and the plaintiffs' attachment, be placed in trust and developed, with the proceeds set aside for the plaintiffs. Very gradually this proposal emerged as central to the settlement. It was attractive to the owners because any agreement on the site would involve forgiveness of the mortgage claims and represent a productive use of the land. It was also attractive to CHFA, which would refinance the project and thereby recoup its original mortgage. Had CHFA foreclosed on its mortgage, it would have been left with a "jinxed site," which no one would pay market rates to develop. By building and then dedicating part of the proceeds to the plaintiffs, development seemed much more likely.¹⁴⁵ But most of all, the plan appealed to the mayor and the city of Bridgeport. By reconstructing the building, the city could convert "a monument to death" into a "monument to life,"¹⁴⁶ to "turn a negative into a positive."¹⁴⁷ By linking the building with the commercial and personal injury settlements, the mediation panel was finally able to bring both CHFA and Bridgeport into the settlement.

The rebuilding was the most dramatic example of integrative bargaining in the L'Ambiance settlement. In the final agreement, the owner, Delwood Development International, Inc., LPLP's general partner, quit-claimed the land to a trust set up to develop the site and distribute the

145. "[P]laintiffs' ownership of the site has had a significant and beneficial impact upon the settlement position of the Connecticut Housing Finance Authority ("CHFA"). CHFA holds the mortgage on the property and has millions of dollars in contractual claims as a result of the collapse. The high potential of a public good arising from the rubble has resulted in major concessions by CHFA to settle its claims." Interim Report, *supra* note 23, at 15.

146. Interview with Judge Robert C. Zampano, *supra* note 109.

147. Interview with Edward Hennessey, *supra* note 104.

THE L'AMBIANCE PLAZA MEDIATION

profits, subject to the CHFA mortgage. CHFA received cash of \$5,248,496 against a mortgage of \$6,800,000. It agreed, however, to continue its mortgage to secure another \$1,229,708 for the new building.¹⁴⁸ CHFA agreed to contribute \$250,000 to the plaintiffs' settlement fund.¹⁴⁹ Bridgeport, on the other hand, received a \$300,000 reimbursement for the rescue and cleanup costs.¹⁵⁰ The city of Bridgeport paid \$1,000,000 to the plaintiffs' settlement fund and agreed to another \$2,000,000 in the form of deferred tax payments on the property.¹⁵¹ Contractors' liens against the property were released as part of the overall commercial settlement.¹⁵²

Settling with the Workers' Compensation carriers was another stumbling block. Each plaintiff was paid Workers' Compensation as a result of the collapse and most would continue to receive payments for life.¹⁵³ In return, the carriers had liens against any settlement based on their subrogation rights.¹⁵⁴ The settlement also had to be either large enough to include the carriers' subrogation rights, thus freeing the contractors from subrogation claims, or to include a waiver of those rights.

Judge Zampano wanted the carriers to pay a lump sum into the settlement fund in exchange for plaintiffs' waivers of any future claim to compensation, not an unusual procedure in cases of workplace injuries. The seven carriers involved in L'Ambiance began negotiations by presenting their own formulas for computing the present value of any future periodic payments. The carriers also insisted on reducing their liability well below what it would have been without the ongoing tort claims because the money from those claims would contribute to the plaintiffs' support.

The plaintiffs, however, objected to the carriers' formulas as unduly restrictive and argued for an increase of the carriers' contribution in re-

148. Special Settlement Proceedings, In Re: L'Ambiance Plaza Litigation (Dec. 1, 1988) [hereinafter Special Settlement Proceedings], Claims and Payments to Commercial Claimants.

149. Special Settlement Proceedings, *supra* note 148, Contributions to Death and Personal Injury Settlement Fund 4.

150. Special Settlement Proceedings, *supra* note 148, Claims and Payments to Commercial Claimants 3.

151. Special Settlement Proceedings, *supra* note 148, Contributions to Death and Personal Injury Settlement Fund 2, 5.

152. Remarks of Judge Robert C. Zampano, Special Settlement Proceedings, *supra* note 148.

153. CONN. GEN. STAT. ANN. § 31-306 (West 1987 & Supp. 1989). Payments end on remarriage or death of a dependent spouse, and when children reach a certain age. The one exception was the family of Scott Ward, the youngest victim of the collapse. Ward was seventeen and working on his spring vacation from high school when he was killed in the collapse. Because he was employed illegally, the compensation carrier refused to pay his family compensation. This freed the family from the strictures of the exclusive remedy rule, but it also meant they had to rely exclusively on the outcome of the tort claims.

154. See *supra* text accompanying notes 85-86.

turn for the waivers.¹⁵⁵ The judges had to evaluate the claims carefully and then negotiate with the carriers as to each individual plaintiff.¹⁵⁶ In the end, the carriers collectively contributed \$3,039,858 to the plaintiffs' settlement fund in exchange for stipulations from the plaintiffs waiving all future claims. The carriers also waived \$1,163,092.19 in liens against the plaintiffs' settlement fund.¹⁵⁷ Ultimately, they traded future liability for lump sum payments, and in doing so they made available more money for the total plaintiffs' fund, and they freed defendants from the subrogation claims, which increased the defendants' contributions to both the plaintiffs' and the commercial settlement funds.

B. *The OSHA Fines*

On November 15, 1988, the mediation panel issued an Interim Report and scheduled a final hearing on approval of the global settlement for December 1, 1988.¹⁵⁸ The panel still, however, did not have in place a resolution of the OSHA fines, and the five defendants cited by OSHA were unwilling to settle without a major reduction in the \$5,000,000 in outstanding fines. These five were, not surprisingly, among the major Group One defendants: Lift Frame, Texstar, TPMI/Macomber, Fairfield Testing Laboratory and Preforce Concrete. Only during the last week of the negotiations were settlements with OSHA finally accomplished.

In March 1988 Judge Zampano and Judge Meadow had met in Boston with OSHA's regional counsel and the Regional Administrator to explain the mediation process and encourage OSHA to participate. The judges stressed that OSHA's cooperation was vital for a successful global settlement. Although OSHA continued to pursue its citations, it had always been willing to considerably reduce the fines. The fines for fatalities at that time ranged around \$800 to \$4,000.¹⁵⁹ Large fines of over \$1,000,000 were habitually reduced from 32% to 89%.¹⁶⁰ The plaintiffs, moreover, had been pressuring OSHA by arguing to the press that the large fines were taking money from the victims' families. As a result,

155. Interview with Jay Sandak, attorney for plaintiffs, in Stamford, Connecticut (July 25, 1989).

156. Interim Report, *supra* note 23, at 13-14.

157. *Id.* Special Settlement Proceedings, *supra* note 148, Contributions to Death and Personal Injury Settlement Fund.

158. Interim Report, *supra* note 23, at 18-19.

159. Interview with Michael Felsen, trial attorney, Office of the Solicitor, U.S. Department of Labor, in Boston, Massachusetts (Apr. 14, 1989).

160. NATIONAL SAFE WORKPLACE INST., FAILED OPPORTUNITIES: THE DECLINE OF U.S. JOB SAFETY IN THE 1980s 19 (1988).

THE L'AMBIANCE PLAZA MEDIATION

Senators Lowell Weiker and Christopher Dodd of Connecticut introduced a bill authorizing the payment of the fines into a trust fund for the benefit of the plaintiffs.¹⁶¹ OSHA had strong humanitarian and political incentives to reduce the fines, because OSHA officials did not want to be viewed as taking money from the children of the victims. Nor did OSHA favor the Weiker bill, which would have established the precedent of using civil fines to pay accident victims.¹⁶² OSHA hoped only to recoup the \$430,000 it had paid NBS to investigate the collapse.¹⁶³ This amount would still represent the largest penalty ever recovered in a construction context.¹⁶⁴

OSHA did insist that its characterization of the offenses be accepted as "willful misconduct." A plea of no contest to a willful violation had important consequences. It would result in much higher penalties in case of any future violations of the same standard by these contractors.¹⁶⁵ The defendants, however, insisted they would never accept the willful characterization of the citations. They wanted the charges reduced to "serious" violations,¹⁶⁶ because they knew that in future OSHA proceedings or any civil suit growing out of L'Ambiance or any other accident, the willful citations would be used against them.

Throughout the spring and summer, Judge Zampano had continued to press OSHA to lower the fines and reduce the citations to serious violations. In all, there were at least six meetings between Zampano and OSHA officials, including one in Washington D.C. with the OSHA Administrator and the Solicitor General's representative. One breakthrough came in late August when the Justice Department announced that it would not pursue criminal charges against any of the contractors.¹⁶⁷ It then became somewhat easier for OSHA to lower its fines.¹⁶⁸

By mid-November, 1988, OSHA was the only "missing piece" in the settlement.¹⁶⁹ After several meetings in New Haven, an agreement was

161. S. 2086, 100th Cong., 2d Sess. (1988).

162. See Felsen, *supra* note 66, at 7. "The moral force of that argument [that the money should go to the victims, not the government] was not lost on the Department of Labor, despite the Department's reluctance to become a de facto Office of Workers' Compensation."

163. *Id.*

164. *Id.* at 9.

165. 29 U.S.C.A. § 666(a) (West 1985).

166. 29 U.S.C.A. § 666(b) (West 1985).

167. Estock, *Twardy on L'Ambiance: No Charges, Drop Penalties*, The Fairfield Citizen News, Nov. 25, 1988, at 14, col. 1. Twardy concluded that the government would not be able to establish beyond a reasonable doubt that the violation of an OSHA standard was the cause of the collapse or that Texstar had been indifferent to or acted in reckless disregard of employee safety.

168. Felsen, *supra* note 66, at 5.

169. *Id.* at 10.

reached to reduce the fines to \$430,000. In addition, the defendants agreed to comply with all OSHA regulations in the future. Regional counsel and other OSHA personnel traveled to New Haven for what was to be the final meeting to sign the settlement documents. OSHA's prepared settlement agreement, however, still contained a clause acknowledging the willful violations, and the defendants refused to sign. Judge Zampano, apparently sympathetic to the defendants' concerns about the future use of the willful citations, threatened to go to the press and report that OSHA was sabotaging the settlement.¹⁷⁰

After more discussion, Zampano suggested a compromise that both sides would accept. In the actual settlement agreements there would be no reference to willful violations, but the mediation panel was to issue a press release stating that "the companies have agreed to withdraw their notices of contest and allow the Occupational Safety and Health Review Commission to affirm the willful and serious citations issued by OSHA."¹⁷¹ The defendants would in turn withdraw their notice of contest and would agree to their respective fines, which were much lower than the original assessments.¹⁷² They would certify that all violations had been abated and would promise future compliance with the Occupational Safety and Health Act.¹⁷³ The agreement stated that the defendants were not admitting any violation or wrongdoing. Most important for

170. Interview with Kevin Coles, *supra* note 69.

171. Felsen, *supra* note 66, at 9.

172. Under the agreement, the fines were reduced to the following amounts: Texstar Inc., \$300,000; Lift Frame, \$26,900; TPMI/Macomber, \$100,000; Fairfield Testing Laboratory, Inc., \$3,000; and Preforce Corporation, \$100. Texstar and its subsidiary, Continental Lift Slab Corporation, also settled seven other OSHA complaints that had been filed against it after L'Ambiance. It paid no penalty for these citations and withdrew its notice of contest. *Secretary of Labor v. Texstar Constr. Corp.*, No. 87-1956, Region I, Settlement Agreement (United States Occupational Safety and Health Review Comm'n, Nov. 18, 1988); *Secretary of Labor v. TPMI/Macomber, A Joint Venture*, No. 87-1955, Region I, Settlement Agreement (United States Occupational Safety and Health Review Comm'n Nov. 18, 1988); *Secretary of Labor v. Lift-Frame Builders, Inc.*, No. 87-1738, Region I, Settlement Agreement (United States Occupational Safety and Health Review Comm'n Nov. 21, 1988); *Secretary of Labor v. Fairfield Testing Lab Inc.*, No. 87-1957, Region I, Settlement Agreement (United States Occupational Safety and Health Review Comm'n Nov. 18, 1988); *Secretary of Labor v. Preforce Corp.*, No. 87-1893, Region I, Settlement Agreement (United States Occupational Safety and Health Review Comm'n Nov. 18, 1988).

In order to induce these defendants to contribute more to the settlement, all fines were paid by the Reserve Fund. *See infra* note 186. In return, TPMI/Macomber paid an additional \$104,000 to the plaintiffs' settlement fund; Fairfield Testing paid an additional \$3,000 and Preforce an additional \$1,000. Texstar waived its \$325,000 commercial claim, and Lift Frame waived its \$175,000 commercial claim. In this way the settlement fund netted an extra \$178,000. Special Settlement Proceedings, *supra* note 149, Motion of the L'Ambiance Mediation Panel Re: OSHA Fines 2, Special Settlement Proceedings, *supra* note 149, Contributions to Payment of OSHA Settlement Fines.

173. *Id.*

THE L'AMBIANCE PLAZA MEDIATION

the defendants, OSHA stipulated that "[n]either this Settlement Agreement nor any of its terms shall be introduced into evidence as to any issue of law or fact or used for any other purpose, in any proceeding, suit, or action, including proceedings and matters arising under the Occupational Safety and Health Act."¹⁷⁴

Counsel for OSHA believed that the agreement satisfied all of the Agency's priorities. The fines were still among the largest in its history and would meet all its expenses. In addition, it avoided a confrontation over the Weiker bill and obtained the defendants' commitment to future compliance with OSHA regulations. As to the willful issue, OSHA personnel believed that they had not given up very much. OSHA can use the existence of the citations, along with the facts available about the L'Ambiance Plaza collapse, in any future proceeding based on a similar violation.¹⁷⁵

Attorney fees to plaintiffs' counsel was the last item to be negotiated. Under the Connecticut Tort Reform Act, fees in personal injury actions could range from a high of one-third of the recovery to a low of ten percent, depending on the amount of the settlement.¹⁷⁶ The Plaintiffs' Steering Committee knew early on that it would have to commit to a reduction in fees, and all members readily agreed to do so.¹⁷⁷ Ultimately, counsel agreed to the panel's proposal to reduce their fees to approximately half of what they would have received under the Tort Reform Act.¹⁷⁸

C. The Final Hearing

By December 1, 1988, the panel had held 400 mediation sessions. According to Judge Zampano, there were problems until the night before

174. *Id.*

175. Interview with Michael Felsen, *supra* note 159.

176. CONN. GEN. STAT. ANN. § 52-251c (West Supp. 1989). The statute allows a contingent fee of 33 1/3% of the first \$300,000; 25% of the next \$300,000; 20% of the next \$300,000; 15% of the next \$300,000; and 10% of amounts over \$1,200,000.

177. Interview with Richard Bieder, *supra* note 94. "Plaintiffs are used to reducing their fees to make a settlement work."

178. The formula was: 25% of the first \$300,000; 20% of the next \$300,000; and 15% of the next \$300,000. Fees for Workers' Compensation settlements were 10% of amounts paid in lieu of future payments. Fees came to approximately 17.7% of the total initial payout. No fees were awarded on the waiver of Workers' Compensation liens. No fees were paid on payments held in escrow to settle unknown future claims, though fees would be paid on any amounts left in this fund at the end of a certain time period. No fees were paid on any other parts of the settlement, including the building site and income derived from any rebuilt structure, or on the \$2 million in tax abatements from the city. Special Settlement Proceedings, *supra* note 149, Motion for Approval of Settlement Procedures, Awards, Contributions and Payments in the Death and Personal Injury Cases 2-4.

the final hearing. Most settlement documents, including large numbers of releases and stipulations, still had to be signed, and some releases were even being drafted the morning of the final hearing during an 11:00 a.m. recess.

Nevertheless, the final hearing took place as scheduled on December 1, 1988. Judge Zampano has a finely tuned sense of a court's role in American culture: part theatre, part high church, and part ultimate expression of civil authority. The final hearing was carefully designed to fill all these roles in order to legitimize the mediation and to create a sense of closure for all involved. Zampano is also a master at translating legal complexities into terms lay people understand. At the final hearing, he gave the L'Ambiance parties what every litigant wants, a short (three hours) and comprehensible day in court.

Every jurisdiction involved in the case was represented at the hearing: the Connecticut State Superior Court, the United States District Court for the District of Connecticut, the Connecticut Probate Court, the Connecticut Workers' Compensation Commission, and the Occupational Safety and Health Administration. Judges from each court, along with the Connecticut Commissioner of Labor, presided simultaneously from the bench. All the plaintiffs and their families, along with their counsel, were invited. The courtroom was filled and the proceedings were amplified for those left standing in the hallways.

Judges Meadow and Zampano began by explaining the details of the mediation process. Zampano stressed how much time and money and frustration had been avoided by mediating rather than litigating. He never, however, minimized the difficulties of the mediation itself. "At first it felt like we were climbing Mt. Everest in our bathing suits," he said at one point. He thanked all those involved and reiterated his sympathy for the plaintiffs. He invoked religious imagery several times, as did other speakers, and then explained the outlines of the final settlement. Papers with the details of the settlement were entered into the record. Then attorneys for the plaintiffs and the defendants spoke, expressing their thanks to the panel and their enthusiasm for the settlement. Although the parties were given the chance to object to any aspect of the settlement, no one did. Finally, each tribunal separately approved the agreement as "fair, just and reasonable." There followed statements by several of the judges praising the efforts of Judge Zampano and Judge Meadow, and congratulating all the participants. The mood was one of awe and celebration. Above all, defendants and plaintiffs were made to feel good about being part of such an historic proceeding.

THE L'AMBIANCE PLAZA MEDIATION

IX. THE SETTLEMENT

The final settlement, including the commercial claims, totalled \$41 million, plus the equity in the L'Ambiance Plaza building site. The plaintiffs' fund had grown to \$34,809,528, though some of this was in the form of structured settlements so that the present value of the fund was lower. Forty-two entities contributed to the fund, including the state of Connecticut.¹⁷⁹ The commercial settlement was funded largely by the three insurance companies issuing the builders' risk policy and the performance and payment bonds. George Macomber paid \$1,000,000 to the plaintiffs' fund and \$500,000 to the commercial fund from his personal assets. The OSHA fines were paid in part from the commercial fund and in part by the individual contractors. George B.H. Macomber Co., Fairfield Testing Laboratory Inc. and Preforce paid \$108,000.01. Texstar assigned its commercial claim for \$325,000 and Lift Frame assigned its commercial claim for \$175,000 to the commercial fund.¹⁸⁰ Together, \$7,798,496 was paid into the commercial settlement fund.¹⁸¹

The plaintiffs' awards were carefully tailored to meet the survivors' needs. In general, estates of deceased victims with no dependents received a lump sum of approximately \$500,000. Estates of younger, single men received more, depending on whether they supported parents or others at the time of the disaster. Parents and spouses received lump sum payments plus annuities for a fixed number of years or for life. The largest amounts went to young families of the deceased victims. Some of these received awards with a present value of up to \$1.2 million with guaranteed payouts ranging up to \$3.2 million including attorney fees. Payments to injured survivors ranged from a net of \$18,750 for emotional distress to \$1,418,564.¹⁸²

Forty-five commercial entities were paid parts of their commercial claims. In all, out of \$16,206,328.86 initially claimed, the parties received \$9,243,846.71.¹⁸³ The panel also provided for future unknown ex-

179. Special Settlement Proceedings, *supra* note 149, Contributions to Death and Personal Injury Settlement Fund. The seven Workers' Compensation carriers were listed as a single contributor.

180. Special Settlement Proceedings, *supra* note 149, Contributions to Payment of OSHA Settlement Fines.

181. Special Settlement Proceedings, *supra* note 149, Contributions to Commercial Settlement Fund.

182. Special Settlement Proceedings, *supra* note 149, Death and Personal Injury Cases, Distribution to Claimants from the \$30 M Settlement Fund. Future payments were to be distributed from development of the building site on a pro rata basis according to the shares indicated in this document.

183. Special Settlement Proceedings, *supra* note 149, Claims and Payments to Commercial Claimants. Commercial claims by subcontractors totaled \$3,506,328.86 and were set-

penses. An additional "Claimant-Beneficiary's Retained Fund" of \$3.6 million was set aside to meet administrative expenses and to deal with new or otherwise unpaid claims. Out of this sum, the panel set up an escrow fund of \$1 million to satisfy the plaintiffs "save harmless" agreements with the defendants (in case of new commercial claims), to reimburse plaintiffs' counsel for out-of-pocket expenses, and in general to resolve any unforeseen problems.¹⁸⁴ A Reserve Fund of \$2,429,708 was established for resolution of the CHFA mortgage on the property and to pay any "short fall" in the commercial claims and the OSHA fines.¹⁸⁵ A Special Master was appointed to administer the settlement and oversee development of the building site. The Special Master's and the Trustee's expenses were also to be paid from the Reserve Fund.¹⁸⁶

Unfortunately, but perhaps inevitably, a few new would-be plaintiffs appeared after the hearing to demand compensation. Six personal injury and one contract claim were filed against the fund after December 1, 1988. After hearings before the mediation panel, four of the six personal injury claimants were awarded \$10,000 and two were awarded \$25,000. The commercial claim was settled for \$606. All of these were paid out of interest earned on the "Claimant-Beneficiary's Retained Fund."¹⁸⁷

A. *Why it Worked*

In the aftermath of the settlement, the mediators, especially Judge Zampano, received a tremendous amount of praise for their accomplishment. Both judges were given an award by the Center for Public Resources and the New Jersey Center for Dispute Resolution held a full day panel on the case. Judge Zampano was later nominated for the Devitt Distinguished Service to Justice Award, one of the highest honors

tled for \$1,095,350.71. Claims against the Builder's Risk Policy and Performance Bonds totaled \$12,700,000 and were settled for \$8,148,496 in cash and a \$1,229,708 mortgage to CHFA.

184. Interim Report, *supra* note 23, at 16. CHFA had been paid cash of \$4,048,496 from the settlement fund, but it still held an outstanding mortgage lien of \$2,429,708. That lien was resolved with a cash payment of \$1,200,000 from the Reserve Fund, and a continuation of the mortgage of \$1,229,708. Special Settlement Proceedings, *supra* note 150, Motion for Approval of Settlement Procedures, Awards, and Payments in the Commercial Cases. CHFA also paid \$250,000 into the plaintiffs' settlement fund. Special Settlement Proceedings, *supra* note 150, Contributions to Death and Personal Injury Settlement Fund.

185. Special Settlement Proceedings, *supra* note 149, Motion for Approval of Settlement Procedures, Awards, and Payments in the Commercial Cases 4.

186. Special Settlement Proceedings, *supra* note 149, L'Ambiance Plaza Escrow Agreement.

187. Motion Re: Approval of Post Settlement Payments, In Re: L'Ambiance Plaza Litigation, Post Settlement Claimants (June 14, 1989); *Id.*, Order Re: Post-Settlement Payments (June 14, 1989).

THE L'AMBIANCE PLAZA MEDIATION

bestowed upon federal judges.¹⁸⁸ The process was praised as a triumph of powerful, charismatic, and dedicated leadership over the complexities of modern commercial and legal reality.¹⁸⁹

The foregoing analysis of the settlement process, however, reveals that the factors present in this case which typically encourage settlement were exploited with considerable skill by the mediators so that settlement became more attractive to the parties than its alternatives. Judge Zampano was able to keep the parties' estimates of the costs of continued litigation high and the potential gains low, or at least uncertain, so that in an analysis of the options, settlement made sense. In addition, by bringing in numerous parties and working out creative solutions, he was able to shift the dispute from a problem in zero-sum, distributive bargaining to one of integrative bargaining in which the efficient frontier of settlement was expanded.

B. *Manipulating Perceptions*

L'Ambiance Plaza teaches that judicial mediators can encourage settlement by changing one or more variables in the linear settlement model.¹⁹⁰ Recall that the model previously described posits that when the plaintiff, considering the odds of winning a fixed amount and the potential costs of litigating, arrives at a reservation price less than what the defendant is willing to pay based on similar calculations, the dispute should settle.¹⁹¹ Perceptions of the probabilities of success and of potential costs are the key variables that determine when settlement is likely to occur. To facilitate settlement, mediators must change those perceptions. They can try to alter the parties' estimates of success on the merits of the claims, or they can alter the potential transaction costs and the potential gains. Judges have considerable resources with which to do both. For example, a judge's control over the disposition of certain legal issues can be used to alter the estimates of probable success. By ruling on preliminary motions, or by indicating how he or others might rule, the judge can revise the parties' probability variables and so alter the reservation prices.¹⁹² On the other hand, judges or other mediators can try to

188. See *supra* note 13.

189. See, e.g., *Successful Mediation in Conn. Apt. Collapse Showcases Aptness of ADR in Larger Cases*, 7 ALTERNATIVES 41, 49 (Mar. 1989): ("What explains the judges' ability to secure such agreements, not only from plaintiff lawyers and the federal government, but also from many other parties? Judicial prestige, perhaps, or persistence, or powers of persuasion. But whatever it is, it is a distinctly personal ability.")

190. See *supra* text accompanying notes 40-41.

191. See *supra* note 41.

192. Schuck, *supra* note 1, at 351-52. See also text accompanying notes 51-53.

alter the parties' estimates of the costs of litigation and the amount at stake, with the same result.

Although Judges Zampano and Meadow never ruled officially on any legal issues in the L'Ambiance Plaza case, they made numerous critical decisions on the facts as to liability and damages. They divided the defendants into three categories based on the extent to which each was responsible for the collapse, in spite of the lack of any meaningful discovery, thereby unofficially deciding on the liability of each defendant. The panel virtually imposed mandatory settlement figures on the plaintiffs when they presented the nonnegotiable minimum settlement offers. The judges also negotiated the amounts of each commercial settlement.

To the extent that the panel discussed specific legal issues, they chose to stress the unresolved and uncertain nature of the law. Zampano refused several times to discuss legal defenses or theories of liability.¹⁹³ He constantly stressed to the defendants, however, how sympathetic a jury was likely to be with these plaintiffs. He often referred to the widows in black robes, to remind each defendant that, at the trial level, the case would turn on the human factors and not on technicalities such as the principle employer rule or the effect of tort reform. He held out the specter of trial judges unwilling to grant summary judgment in such an emotionally charged case. To win on legal grounds, appeals would be necessary. All this served to raise defendants' estimates both of the plaintiffs' chances of prevailing, and of the defendants' total liability if that occurred.

The cost variables were also stressed throughout the mediation. Judge Zampano reiterated how much discovery would be required, how expensive the inevitable appeals would be, and how long it would take (up to ten years) before any plaintiff would actually be paid anything. The plaintiffs were reminded of the low amounts of insurance available, the probable insolvency of many defendants, and the emotional toll of dragging the case through discovery and trial. The early commencement of the mediation made this tactic especially effective. By staying further litigation and eliminating virtually all discovery, the panel kept future costs very high in comparison with the costs of settlement. At the same time, the number of defendants was increased to keep the costs high. With each new defendant, potential costs rose as issues and paperwork multiplied.

When asked why they agreed to the L'Ambiance settlement, most of the attorneys involved answered in terms that validate the use of a linear

193. Interview with Judge Robert C. Zampano, *supra* note 108. See also text accompanying notes 107-108.

THE L'AMBIANCE PLAZA MEDIATION

settlement equation to explain the case. Economics drove the settlement.¹⁹⁴ For each party, the expected gains, the low or uncertain probability of success, and the estimated costs of continued litigation made settlement impossible to refuse.

C. *Expanding Opportunities for Trades*

Even more important for the settlement than the manipulation of the parties' perceptions was the way in which the two judges created new opportunities for mutual gain and expanded the efficient frontier of the dispute so that the parties could reach an integrated, nonzero-sum settlement. The panel accomplished this by bringing many defendants into the mediation process, by identifying the diverse interests of all the parties and expanding the items on the table for discussion, and linking together different items or creating tradeoffs that resulted in mutual gain. This created an efficient frontier of possible settlements based on a series of linkages of items with differing priorities, or values, for each of the parties.¹⁹⁵ Essentially, the plaintiffs valued high settlements paid quickly and were indifferent as to whether the defendants settled the OSHA or commercial claims. The defendants, on the other hand, placed a high value on the OSHA and commercial settlements and were willing to place a low value on prompt payment. The defendants, because they were resigned to paying the limits of their insurance policies, also put little value on varying the amounts of the individual settlements, except as they affected assets available to pay commercial claims. The defendants, therefore, were willing to accept a variety of plaintiffs' packages that were also acceptable to the plaintiffs, if they could resolve their commercial claims: a perfect opportunity for an integrated settlement. There was, in other words, an efficient frontier of acceptable settlements of all the issues such that an improvement for one party did not mean a disadvantage for the others.

Focusing on a global settlement, Zampano included the commercial claims and the OSHA fines among the bargaining items. The defendants valued these claims differently, so by linking the settlement of the personal injury and commercial claims, Zampano was able to induce many parties to settle. Recall that Zampano had deliberately cast a wide net

194. Interviews with all defense attorneys and plaintiffs' attorneys confirmed this view. Only the city's counsel, Edward Hennessey, mentioned the linkage to the reconstruction of the site and the city's political need to get L'Ambiance out of the public consciousness as a reason to settle.

195. For a discussion of the way such prioritizing can aid in negotiating settlements, see H. RAIFFA, *supra* note 10, at 131-65; 251-55; 288-317.

for commercial claimants. From the beginning, he asked every defendant who they had claims against and what evidence they had to support those claims. While in early October it appeared that these expectations might jeopardize the whole personal injury settlement, in the end the opposite was true. By linking settlement of the commercial claims with the personal injury claims, Zampano was able to make settlement of the latter much more attractive to many of the key defendants.

By far the two biggest tradeoffs made by the parties involved the reconstruction of the building and the OSHA fines. For the city in particular, the reconstruction served its interest in creating a positive public image. The value of the building, psychologically and in future revenues, outweighed the City of Bridgeport's financial contribution to the settlement. For CHFA, the building was a symbol as well as an opportunity to recoup some of its investment as interest on the continuing mortgage. For the plaintiffs, too, the building had symbolic value. Many of them were reluctant to agree to any settlement that would allow the owners to continue with business as usual.¹⁹⁶ The reconstruction not only held the promise of future income for the plaintiffs, it also made certain that LPLP and TPMI/Macomber would be deprived of any chance to recapture their L'Ambiance losses through profits on a new L'Ambiance Plaza.

The importance of the OSHA fines to the OSHA defendants was obvious. Their interest in avoiding \$5 million in fines and in suffering an administrative finding of fault was very strong. The resolution of the OSHA citations cleared the way for the contribution of several million dollars to the settlement fund.

The settlement of all Workers' Compensation claims was important to the plaintiffs. To settle the personal injury claims without certainty as to how much would be claimed by the carriers exerting their subrogation claims, and with no clarity as to the status of future benefits would have been unacceptable. To resolve these issues, Zampano had to link the personal injury settlements with waivers of the subrogation liens and a lump sum contribution to each plaintiff in lieu of future compensation.

Finally, at its most basic level, the settlement involved the typical trade of time for money that is characteristic of most personal injury negotiations. The defendants' desire to put L'Ambiance behind them, and the plaintiffs' desire for some money damages before the defendants became judgment-proof created a perfect opportunity for a nonzero-sum solution.

196. Interview with Jay Sandak, *supra* note 155.

THE L'AMBIANCE PLAZA MEDIATION

X. IMPLICATIONS FOR JUDICIAL MEDIATION

The unique powers of judicial mediators were responsible to a great extent for the panel's success in creating an integrated settlement. It is important to examine this aspect of the process so as to appreciate its implications for future judicial mediation. First, Judges Zampano and Meadow used their status and influence to bring into the mediation process large numbers of potential defendants to create the global settlement. They also stopped the participants from filing more suits or pursuing discovery. While both judges had the ability to obtain stays of proceedings pending in their respective jurisdictions, they had no real power to stop the parties from filing discovery requests or from bringing more lawsuits. Yet, except for the OSHA proceeding, which was eventually stayed as well, all litigation stopped with the commencement of the mediation.

Moreover, Judge Zampano had access to other government entities rarely available to private mediators. Just as he brought the defendants to the bargaining table, he brought OSHA, an independent federal agency, into the process with a single phone call. He met with high ranking OSHA officials in Washington, and his urgent requests for a compromise probably reached the Secretary of Labor. He also obtained a \$3,000,000 contribution from the state of Connecticut, hardly a typical occurrence in mass tort litigation.

Zampano also exerted considerable pressure over outsiders. The national and local press respected his insistence on secrecy. No reporters ever approached the plaintiffs to discuss the mediation and there were virtually no serious press leaks.¹⁹⁷ At the same time, Zampano made extensive contact with experts on various aspects of the case and obtained a lot of information that helped him and Judge Meadow in negotiations. He spent five hours with an expert on builders' risk policies and performance and payment bonds. He met with leading Workers' Compensation attorneys and local claims managers. He contacted other judges who had presided over other mass tort settlements.

Finally, both judges made full use of their status to exert considerable moral pressure on the parties to settle. While some of this moral suasion can be attributed to Judge Zampano's personality, his deep personal

197. This can be partially explained by Judge Zampano's efforts to keep the press informed when he felt able to release information. By giving interviews and releasing news at key stages in the proceedings, he maintained control of the flow of information and satisfied the press so that they respected his requests for discretion.

commitment to the case,¹⁹⁸ and the respect he commanded from the legal community, any judge has, by virtue of the office, considerable persuasive powers. A judge can exert pressure that would not be tolerated in a private mediator. In fact, shortly after the L'Ambiance collapse, a private mediation service in Hartford, Connecticut known as Dispute Resolution, Inc. began initial meetings with insurance carriers to try to settle the case. The effort was slow and cumbersome, and ultimately ended when Judge Zampano was appointed mediator. Even in those few months the difficulties for private mediators surfaced after there was a dangerous leak to the press. As a result, many parties were reluctant to reveal their strategies or to participate, so that by January 1988 only a few defendants were involved. In addition, the private firm ultimately lacked the resources for such a large-scale mediation effort.¹⁹⁹

The judges enhanced their already considerable powers of office by deliberately isolating the parties and maintaining the panel as the central point around which all negotiations took place. By insisting on meeting individually or in small groups with the parties, they prevented alliances from forming among the defendants.²⁰⁰ The panel also maintained enormous control. Judge Zampano and Judge Meadow had extensive knowledge about the case. They knew more about L'Ambiance Plaza than anyone else, even after the settlement was made public. Knowledge is power in negotiations, and both judges made certain they would wield that power.

Special factors in the L'Ambiance Plaza mediation also contributed to its success, but these factors are not necessarily beyond replication. Judge Zampano commanded enormous respect from all the attorneys involved, even before the mediation began. Most attorneys, moreover, were part of a close knit legal community. All of them knew and for the most part trusted one another, and they knew they would have to work together again in the future. Judge Zampano also encouraged trust and confidence among the parties, and built that trust by his continuous insistence on personal contact with the actual clients.

Other special aspects of the case had to do with the parties. The plaintiffs, Zampano himself noted, were never greedy. Although they were angry and grieving all through the process, they never insisted on total

198. Interview with Judge Robert C. Zampano, *supra* note 108. Zampano's personal commitment to obtaining adequate and speedy relief for the plaintiffs intensified considerably after the individual meetings.

199. Interview with Donald Reder, President, Dispute Resolution, Inc., in Hartford, Connecticut (Mar. 10, 1989).

200. See H. RAIFFA, *supra* note 10, at 251-74 for a discussion of shifting alliances in multiparty negotiations. Zampano's deliberate insistence on dealing singly with the parties minimized the chances that such alliances might threaten the settlement.

THE L'AMBIANCE PLAZA MEDIATION

victory over the defendants or sought unreasonable sums. The defendants were small or mid-sized businesses. Often the business owner was personally related to the victim. The defendants considered many of the victims to be close friends; people who had worked alongside them and whom they had brought into the construction business. These owners wanted to help the victims by making a contribution so as to make up for the tragedy in which they all were involved. Most of all, the defendants were practical businessmen anxious to get on with their lives and their businesses. The need to close their files and put the case behind them was arguably greater for small businesses than for large corporations.

With the foregoing analysis, it is possible to summarize those aspects of the L'Ambiance mediation panel's behavior that can be applied to future mass tort settlements.

1. Various factors kept the parties' RPs in a relationship that made settlement attractive. These factors included early intervention and stay of all proceedings so that past investment in the case was low, but anticipated future expenditures were very high.

2. The early identification of the parties' primary interests and the expansion of items in the dispute to create linkages and tradeoffs.

3. The use of judicial power to bring into the process all parties necessary to resolve the enlarged dispute.

4. The creative use of remedies that would be unavailable in an adversary proceeding, such as the reconstruction of the building, the press conference as part of the OSHA settlement, the \$2 million tax abatement from the city and the CHFA mortgage continuation, and the resolution of the Workers' Compensation claims.

5. Extensive direct personal contact with the parties to establish trust in the mediation and the mediators, and to create a substitute for due process hearings in which each party has an opportunity to be heard by a neutral decision maker.

6. The isolation of the parties from one another in order to maintain control over the process and prevent destructive coalitions from forming.

7. The meticulous preparation and thorough knowledge of every aspect of the case.

8. The insistence on maintaining the integrity of the process by maintaining the confidentiality of the meetings and creating an atmosphere of trust.

While the degree to which each of these techniques was successful can be attributed in part to Judge Zampano's personal skill and dedication, the basic techniques can be applied in other settings and probably are, in different ways, standard features of judicial mediation. Early intervention is becoming more frequent in mass torts, and several have settled

recently with unusual speed.²⁰¹ Judges have manipulated the parties' estimates of the strength of their case for as long as they have held settlement conferences. Judges frequently see their role in settlement as providing a supposedly neutral opinion on the validity of each side's claims in order to move both closer to settlement.²⁰² Other forms of manipulation, such as ruling on pretrial motions, or the use of experts or mock jury trials, are variations on this theme. Identification of the parties' real interests and meeting those interests is precisely what mediators are supposed to do.²⁰³ Individual meetings with parties and participation by non-parties are less common, but can readily be initiated in other appropriate contexts.²⁰⁴

XI. EVALUATION OF THE MEDIATION PROCESS

In spite of the enthusiasm with which the L'Ambiance settlement was greeted, questions remain about whether the mediation process comported with the basic values of the judicial system. Before others can embrace the L'Ambiance mediation as a model, there should be some attention paid to whether all, or parts, of that model ought to be encouraged.

Dispute resolution processes are generally measured by three criteria. One is efficiency; is it less costly and less time-consuming than its alternatives. Second is it fair and just for all parties, and third, is it consonant with the goals of the judicial system as a whole. Some aspects of the L'Ambiance mediation process did not meet these three criteria. Given the available alternatives, however, the advantages of the process outweigh the disadvantages.

There is little question that the process saved a great deal of time and money for the parties. The reason most frequently given by the parties for settling was that economically there was no other choice. To a great extent, however, costs were not avoided by the parties, but were merely shifted from the parties to the court.²⁰⁵ Two judges and their staffs spent most of eleven months on the case. Judge Zampano continues to work every day with the Special Master on issues of administration. Of course,

201. See *supra* notes 3 and 4.

202. Brazil, *supra* note 6; Lynch & Levine, *supra* note 5.

203. L. SUSSKIND & J. CRUIKSHANK, *supra* note 27, at 162-65.

204. Brazil, *supra* note 6, at 16-19.

205. L'Ambiance was less costly than other mass tort settlements. For the Agent Orange case, Judge Weinstein in the Eastern District of New York appointed three special masters and set up a special document headquarters with its own clerk. P. SCHUCK, *supra* note 11, at 112.

THE L'AMBIANCE PLAZA MEDIATION

it is not possible to measure accurately how these costs compare with the costs of a lengthy trial for either the parties or the judiciary. On balance, it is likely that regardless of the high cost to the state and federal systems, those costs would have been much higher had the case gone to trial and appeals. The mediation, then, did meet the first criteria of efficiency. Nevertheless, if public resources are to be devoted to mass tort settlements, some effort should be made to measure the public costs involved.

The second criteria of fairness and justice is more problematic. Most of the participants believed that justice was done and that the settlement was a reasonable way to deal with a terrible tragedy.²⁰⁶ They also believed that the mediation process itself was fair. There are dissenters, however. Some defendants feel that they were forced to pay damages with no legal liability. The company that supplied a screw used in one of the shearheads, paid \$150,000 into the settlement. A crane operator who had left the site three days before the collapse and returned to participate in the rescue paid \$250,000. Judge Zampano stated openly and often that the Group Three defendants were simply asked to pay their estimated costs of defense; none of them appeared to have any legal liability. Such results raise serious due process questions. Such questions multiply when one recalls that the defendants were never sued by any plaintiff, but were instead forced into a settlement proceeding at the request of a federal judge.²⁰⁷

Finally, there is the third criteria of whether the mediation served the goals of the justice system. These goals include compensation for harm and an efficient allocation of the costs of that harm. The L'Ambiance mediation met these goals. To a greater degree than would have been possible through litigation, each party received at least some compensation, and the costs were shared by all the entities involved. Space does not permit an inquiry into the efficiencies of various forms of tort compensation.²⁰⁸ It seems, however, that this mediation served at least as well as most trials to allocate costs and compensation in a tolerable manner.

Two other systemic goals were less adequately served. The first concerns fairness and justice, and is closely linked to the issue of individual justice. One goal of the tort system is to institutionalize some societal judgment either by condoning or condemning the parties' behavior. In this way, society establishes its expectations for private and public behavior and penalizes those whose behavior falls below those expectations.

206. Judge Zampano received numerous letters from plaintiffs thanking him for his efforts.

207. See *supra* text accompanying notes 97-98.

208. See, e.g., R. POSNER, *supra* note 43, at 147-99; Epstein, *supra* note 1.

A related goal of the system is to make law that sets standards for future behavior and establishes precedent for future cases. The L'Ambiance mediation contributed very little toward these goals. Because responsibility was dispersed over so many entities, actual responsibility was never allocated with certainty. As a result, no single entity was found to be at fault, thus making future deterrence minimal.

On the other hand, lift slab construction has largely been eliminated as a viable construction method, and many companies found that the protection of Workers' Compensation was ephemeral. Because the L'Ambiance settlement cost some defendants a great deal of money, it may have provided some incentive for greater workplace safety, especially in construction.

There were, however, many lost opportunities for judicial lawmaking that would have had a great impact on future tort cases. The exclusive remedy rule remains unchanged, and as long as mass torts are settled, no court will have to reconsider that rule in the context of large-scale damages. There was also no definitive interpretation of the Tort Reform Act. Conversely, the litigation did raise public awareness of many legal issues that are now the subject of legislation and administrative regulation. The principal employer rule has been modified to provide greater protection for construction workers.²⁰⁹ A temporary moratorium was placed on lift slab construction in Connecticut.²¹⁰ In addition, OSHA has proposed changes in its regulations for lift slab construction,²¹¹ and there is a bill pending in Congress to strengthen OSHA's enforcement powers in the construction industry.²¹²

Many of the L'Ambiance defendants wanted exoneration. They wanted to be absolved from blame for what happened. Most of them suffered from survivors' guilt, even though they believed they had not caused the collapse. Yet, because they all contributed to the settlement fund, no defendant was fully exonerated, as they may have been by a jury or a court. On the contrary, the whole thrust of Judge Zampano's efforts was to make every defendant feel responsible so that each would agree to settle.

Did the L'Ambiance settlement serve justice? The answer is mixed. The process served many goals of the judicial system well. It served others less well. Before any final evaluation can be made, it is necessary

209. CONN. GEN. STAT. ANN. § 31-291 (West Supp. 1989).

210. CONN. GEN. STAT. ANN. § 29-276a (West Supp. 1989). The moratorium is to last until the state building inspector and the codes and standards committee adopt regulations with "stringent safety requirements" for the use of lift slab construction methods.

211. Concrete and Masonry Construction Safety Standards; Lift-Slab Construction, 53 Fed. Reg. 35,972 (1988).

212. S. 2518, 100th Cong., 2d. Sess. (1988).

THE L'AMBIANCE PLAZA MEDIATION

to consider the alternatives. How else could L'Ambiance Plaza have been dealt with? A trial would have taken years and would inevitably have been followed by appeals and perhaps retrials. At some point there would have been a settlement, though probably at much greater expense to the participants. Fewer defendants would have been involved, but perhaps fewer would have received any payment of their commercial claims. The impact on their businesses would have been worse, and some might have ceased to exist.

Perhaps the most significant lesson of the L'Ambiance mediation is that mass tort litigation may have become too complex for the legal system to deal with in traditional ways. New techniques need to be developed in order to serve the mediation participants without sacrificing the goals of the justice system. The L'Ambiance Plaza mediation was a major step in this direction. Judge Zampano developed and fine-tuned several mediation techniques that can enable the system to resolve such cases more efficiently. These techniques will be copied and developed further. We have not seen the last building collapse or plane crash. In the meantime, some of our traditional notions of fairness and due process may be altered. Fault will certainly play a lesser role than it has in resolving mass tort disputes. Legislatures will take over some of the judicial function of allocating the cost of accidents. Perhaps some attention will be paid to lowering the high costs of litigation that made settlement an unavoidable alternative for so many parties in L'Ambiance Plaza.

L'Ambiance also demonstrates how disputes are coming to be seen as economic and managerial problems, to be dealt with through principles and techniques learned from disciplines other than law. In essence, mass torts are forcing the system to incorporate nonzero-sum outcomes into a zero-sum environment. Through judicial mediation, integrative bargaining and creative solutions can be imposed within an adversarial framework. The question the case raises for the future is the degree to which the advantages of such solutions outweigh the losses to some of our traditional due process values.

